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S. Hrg. 106–196

FEDERALISM

HEARINGS

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

MAY 5, 1999
THE STATE OF FEDERALISM

MAY 6, 1999
FEDERALISM AND CRIME CONTROL

JULY 14, 1999
S. 1214—THE FEDERALISM ACCOUNTABILITY ACT OF 1999

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U.S. GOVERNMENT PRINTING OFFICE
59–454 cc WASHINGTON : 1999

For sale by the Superintendent of Documents, Congressional Sales Office
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FEDERALISM

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THE STATE OF FEDERALISM

WEDNESDAY, MAY 5, 1999

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:12 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Fred Thompson, Chairman of the Committee, presiding.

Present: Senators Thompson, Collins, Voinovich, Lieberman, Levin, and Edwards.

OPENING STATEMENT OF CHAIRMAN THOMPSON

Chairman THOMPSON. Let us come to order, please. Gentlemen, thank you for coming. I apologize for being a little late. I picked a bad morning to have a meeting downtown this morning.

I know that you have limited time before you have to depart. I will ask the Committee Members to refrain from making opening statements and let the witnesses testify, and then we will have an opportunity to make opening statements. I would like to insert opening statements from Senators Collins, Levin, and myself, into the record.

[The prepared opening statements of Senators Thompson, Collins, and Levin follows:]

PREPARED OPENING STATEMENT OF CHAIRMAN THOMPSON

The issue the Committee is discussing today is at the heart of our Democracy. Federalism is the principle that some matters are best handled by State or local government and other matters should be addressed at the Federal level. Federalism helps clarify what government should be doing and where it should be done. The Framers of our Constitution strongly believed that government closest to the people works best. The chief architect of our Constitution, James Madison, said "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

The Framers had good reason to limit the power of the Federal Government. The diffusion of power between the Federal Government versus State and local government, as well as among the different States, can lead to healthy competition. States will compete for citizens business, taxes and talent. Citizens can vote with their feet to choose among different government services. This will lead governments to strive to provide better services, lower taxes, and a higher quality of life tailored to the values and needs of the community.

But we have strayed far from the federalist vision of the Framers. As Justice O'Connor noted, "The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: First, because the Framers would not have conceived that any government would conduct such activities, and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities." Indeed, some proponents of Big Government view federalism as an historical relic. The consequences of this drift are regrettable. The Federal Government seems to many to be

irresponsive, wasteful, and corrupt. Public cynicism toward government has risen to alarming levels. Some citizens feel that their right to vote, a right that came at a very high price, has lost its meaning.

Reviving federalism would mean that many important decisions that affect people's lives would be made closer to home. Government as a whole could be more efficient, effective and accountable. Despite the many obstacles, there is hope that federalism is reascendant in the historical dialogue. The Supreme Court has breathed new life into federalist doctrines. Congress has taken some important steps to return authority to the States. And many State and local officials and the people they serve are rightly demanding a voice in the debate. Ultimately, that uniquely American quest may be the greatest hope for success.

PREPARED OPENING STATEMENT OF SENATOR COLLINS

Mr. Chairman, I commend you for holding these hearings on the State of Federalism. My hope is that these hearings will be an important first step that will help restore the vital principles that serve as the basis of our constitutional form of government. Clearly, the Federal Government has been a positive force for change in our society over the past 30 years, especially in areas such as environmental protection and civil rights. It will continue to do so in the future. However, I have become increasingly concerned that the Federal Government's role in our society has expanded far beyond what the constitutional Framers intended. Moreover, this expansion has continually encroached on the traditional prerogatives of State and local governments.

The United States Constitution established the basic federalist principles that are the framework for the distribution of power among Federal, State and local governments. Under the Constitution, the Federal Government's proper role is to assume responsibility for broad national issues that directly impact the Nation as a whole, such as defense and the regulation of commerce between the States. As we all know but far too often forget, the Tenth Amendment to the Constitution reserves most other powers to State and local governments. The constitutional Framers wisely understood that, by virtue of their proximity to the people, State and local governments are in by far the best position to evaluate and respond to the needs of their communities and citizens.

Unfortunately, Congress and unaccountable Federal agencies too often have undermined these critical federalist principles through well-meaning but ultimately counterproductive legislation and regulations. I am particularly concerned about Federal laws and regulations that "preempt"—or nullify—traditional State and local laws. Without the ability to manage their affairs free of unwarranted Federal intrusion, State and local officials cannot craft workable programs that balance the competing interests of all citizens and at reasonable costs.

Reversing the trend towards greater Federal control will require increasing vigilance by those of us who strongly support federalist principles. For example, last year the Clinton Administration introduced Executive Order 13083, which revoked a Reagan Administration Executive Order on federalism and would have granted the Federal Government unlimited policymaking authority over the States. Mr. Chairman, I eagerly cosponsored your Sense of the Senate Resolution—which was adopted by unanimous consent—demanding that the President revoke his Executive Order. In August of last year, President Clinton thankfully withdrew this unwise Executive Order.

I again commend you Mr. Chairman for directing the public's attention to this key issue. As a result of these hearings, I hope we can identify other useful steps that will advance the goal of restoring the proper role played by the Federal Government in the lives of our citizens. Such steps will hopefully deter Congress and Federal agencies from unnecessarily preempting State and local authority and restore the balance between Federal and State power that is called for in our Constitution. Thank you, Mr. Chairman.

PREPARED OPENING STATEMENT OF SENATOR LEVIN

Mr. Chairman, thank you for calling these hearings on the State of Federalism. It is, as always, a timely and important issue.

We know from our Constitution, from our history books and from our experience that the relationship between the Federal Government and State, local, and tribal governments is one of balance and equilibrium, a partnership. Alexander Hamilton wrote in Federalist Paper No. 31 that "it is to be hoped" that the American people "will always take care to preserve the constitutional equilibrium between the general (that is, Federal) and the State governments."

That's the foundation upon which we must look at the operations of our laws and programs today. How are we doing in preserving the delicate balance, the equilibrium and partnership between the Federal Government and State, local, and tribal governments?

Many of us in the Senate can appreciate this issue from both sides. We have served as either governors, mayors, or State legislators before coming to the Senate. I had the privilege of serving as the President of the Detroit City Council for a number of years before being elected to the Senate. And from that perspective, I know how important the Federal-State relationship is.

That relationship is affected most directly when we at the Federal level preempt State law, either explicitly or implied. If we do it explicitly, then we have to be sure we are not upending the equilibrium of the Federal-State relationship. We need to evaluate whether the Federal preemption is not only useful or beneficial, but whether it's necessary. There are times when most of us have voted to affirmatively preempt State laws, and we did so out of the belief that it was the right thing to do for the benefit of the American people. We have done that with respect to our clean air and clean water standards that know no geographic boundaries; we have done that with regulating trucks and vehicles that drive through any and all States in our Nation; we have done that in the area of communication. I supported those laws and those decisions to preempt.

But all too often we in Congress don't even address the issue of preemption when we legislate. We are silent about our intentions, and that silence requires both the Federal and the State and local agencies—and oftentimes the courts—to read the tea leaves, so to speak, to determine whether or not we in Congress intended to preempt State law. I think in those situations, the State and local governments should have the benefit of the doubt and the presumption should be that if Congress doesn't explicitly preempt, it does not intend to preempt. That's why for several Congresses I have introduced a bill to direct the courts not to find preemption if the statute doesn't explicitly require it. I hope we can make progress on that bill this Congress.

I believe that Federal preemption of State, local or tribal law should be an affirmative, eyes-open action, and not one that we happen to fall into because a court has found an implication somewhere in the legislative history.

For example, I am an original cosponsor of the Feinstein-Levin-Bryan bill, S. 678, which would protect consumers against "title washing" of automobiles. This bill was drafted in close coordination with a number of State attorney generals, including the Michigan Attorney General. We've included a very specific provision about how the bill would interact with State laws and regulations. We recognized in drafting the "title washing" bill that States including Michigan and California already have tough consumer laws on this subject and—in this case, as is often true, they provided an excellent model for Federal standards.

I also introduced legislation to deter deceptive sweepstakes mailings, and I cosponsored a bill on the same subject with Senator Collins. We've been careful not to inhibit the States from having their own, more protective laws and to delineate the extent to which we're preserving States' authority. We want to augment, not supersede, their efforts. We want a floor in our Federal laws for consumer protection in this instance, not a ceiling.

With respect to the impact of Federal regulations on State and local government, Senator Thompson and I have introduced the Regulatory Improvement Act, S. 746, which requires cost-benefit analysis and risk assessment of major rules and that agencies seek the opinions and experience of State and local governments when regulating in areas where they would be affected. I appreciate the support of the State and local organizations for this bill. As those organizations know, S. 746 specifically requires Federal agencies, in the rulemaking process, to consider alternatives that will provide flexibility for State and local governments. S. 746 also fosters openness and public participation. I believe the bill is just the type of bill that promotes partnership and maximizes the use of everyone's resources.

I look forward to hearing the testimony of our witnesses today, both the elected officials and the learned scholars who can give us a context of where we've been and where we're likely to be going. It is always good to hear from the representatives of our States, counties, and cities, and discuss how we can work together to make things better for all our citizens, throughout our Nation.

Chairman THOMPSON. I will go ahead and recognize our first panel. We are pleased to have with us today the Hon. Tommy Thompson, Governor of the State of Wisconsin and President of the Council of State Governments. He will be followed by the Hon. Mi-

chael Leavitt, Governor of the State of Utah and Vice Chair of the National Governors' Association. We are pleased that you would be here with us today, two of our more outstanding governors. I could think of no one who could better help us wade through these issues than you two gentlemen. We know it is an inconvenience for you, but we sincerely appreciate your being here with us today.

Without further ado, if you have opening comments that you would like to make, please do so, and we will put any prepared statement that you have into the record. Governor Thompson.

TESTIMONY OF HON. TOMMY G. THOMPSON,[1] GOVERNOR, STATE OF WISCONSIN, AND PRESIDENT, COUNCIL OF STATE GOVERNMENTS

Governor THOMPSON. Thank you so very much, Mr. Chairman. It is a delight for me, coming from Wisconsin, to address this august body and to address Chairman Thompson as Chairman. I like that very much.

Chairman THOMPSON. I have been trying to claim relationship, but nobody will believe me.

Governor THOMPSON. You have done an outstanding job, and Senator Collins and, of course, Senator Voinovich, who left the ranks of being a governor and now is an outstanding U.S. Senator. It is always a pleasure to see my good friend, George, again.

Of course, we are all very sympathetic and saddened by the two individuals that died in Armenia yesterday, late last evening, as well as the terrible tornadoes in the Midwest, in Kansas and Oklahoma. But it is a pleasure for both Governor Leavitt and myself to have this privilege to address this august Committee on a very important issue of federalism. Mr. Chairman, federalism and devolution, as you well know, represent a cornerstone of our Nation's underlying democratic principles, and you, Mr. Chairman, have led the fight in this and we applaud you from the State level.

The Tenth Amendment to the Constitution of the United States recognizes the uniqueness that continues to exist and thrive at each and every State in America. More importantly, the Tenth Amendment acknowledges that the States have the authority as well as the ability to minister to their own needs. When our forefathers debated how our Nation would be governed, they devised a clear set of principles that defined the roles as well as the responsibilities of the Federal Government and State Governments. Yet, over time, adherence to those principles have suddenly eroded.

Recently, a shift from the "Washington knows best" attitude ushered in the first change in the majority in the U.S. House of Representatives, and along with the distinguished Chairman and other U.S. Senators, formed a partnership called the new-found federalism. A strong component that helped fuel the shift of power can be directly attributable to a platform that clearly emphasized a return of power as well as control to the State level. After the elections in 1994 and then after the elections in 1996, it somehow slowed down. The discussion of devolution did not appear as often as it did in 1994 and 1995, but we were able to get some legislation

[1] The prepared statement of Governor Thompson appears in the Appendix on page 143.

passed, which was led by you, Senator Thompson, and, of course, urged on at that time by Governor Voinovich.

To this end, Mr. Chairman, it is with a sense of optimism for reform and historical gravity that I address this august body. I strongly commend you for your appreciation and attention to the issue of federalism, for when granted the power and the flexibility, States and local governments have proven to be the innovators of the ideas and reforms that are improving the lives of all Americans.

Throughout our history, State and local governments have acted as the laboratories of democracy. State and local governments continually amaze us with innovation and decisive action when they are allowed to flourish unfettered by excessive Federal restraint.

It is critical, then, that we closely examine the relationship and responsibilities respective to our governing bodies and review the impact Federal restrictions have on the States' ability to govern effectively. More importantly, as we enter a new millennium, we must reinvigorate the partnerships among the Federal, State, and local governments to ensure the American people are the benefactors of a strong united effort to address and solve the problems that face our great country.

As President of the Council of State Governments, I speak to you today on behalf of an organization whose individual members are involved daily in conducting the people's business at the State level. CSG is comprised of State leaders from all 50 States and U.S. territories, representing all three branches of government. CSG's membership is the living embodiment of the vibrancy of American federalism. CSG has consistently been a strong proponent of the federalist model.

Our commitment to sharing those principles was reinvigorated at a summit convened in November 1997, following the enactment of the very far-reaching Unfunded Mandates Reform Act of 1995. At the prompting of Governor Michael Leavitt, the meeting, held in conjunction with the American Legislative Exchange Council, the National Conference of State Legislatures, and the National Governors' Association, was convened to recommend State reaction to the historic devolution of shifting responsibilities from the Federal to the State Governments. Then, as now, States faced a variety of challenges and opportunity as they approach varying degrees of Federal restriction.

The summit produced an 11-point plan aimed at improving balance and greater accountability to that State and Federal partnership. I have attached a copy of the 11 points advocated at the conclusion of that meeting to my written testimony, but I would like to quickly summarize those objectives and provide a few brief examples of how Federal restrictions and interference is impacting our ability to institute positive reform in our respective States.

The principles voted on and passed at that meeting include asking Congress to limit and clarify Federal preemption of State law and Federal regulations imposed upon States, streamline block grant funding, and simplify the financial reporting requirements. I could never understand who reads all of these reports that you ask us to send to you. I am sure that there is somebody out here that does.

Chairman THOMPSON. Senator Lieberman reads most of them for us.

Governor THOMPSON. I am sure you do.

Senator LIEBERMAN. Actually, they are behind us.

Governor THOMPSON. Just like I do as Governor, all the reports that come to me.

As Governor of the State of Wisconsin, I have dealt with a wide variety of Federal restrictions that prevent my State from reaching its full potential and advancing the best interests of our citizens. From welfare reform to health care, States like my own of Wisconsin have become America's laboratories of reform, instituting dozens of innovative initiatives that have made our programs models for the Nation.

Yet, I have had to travel to Washington, as most governors do, to solicit on bended knee the permission to implement landmark reforms. I am not alone. My experience and the experiences of other State leaders have made the boundaries of the devolution debate clearer today than ever before. Time and time again, we have developed and passed legislation to deal with our unique problems, only to be rebuffed by the Federal Government. Let me briefly describe some more recent issues to illustrate the frustration at the State level.

The integrity of the 1996 welfare reform agreement is threatened by attempts by some people in Congress—nobody on this Committee, I am happy to be able to announce—and the administration to reduce the funding and to restrict the flexibility of welfare-related programs, including the temporary assistance for needy families, more commonly referred to as the TANF block grant. In 1996, Congress, the governors, and the administration entered into an historic welfare reform agreement. In exchange for assuming the risk involved with accepting the primary responsibility for transforming the welfare system from one of dependency to self-sufficiency, governors agreed to 5 years of guaranteed funding, along with new flexibility to administer Federal programs. In my own State of Wisconsin, we reduced the welfare caseload by over 91 percent.

Any attempt to change welfare reform-related programs or the funding, to me, is a serious violation of that commitment and of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and certainly would undermine the States' welfare reform efforts. In Wisconsin and throughout America, welfare reform has demonstrated that States can best solve the problems when given the flexibility and support. Congress gave the States the freedom to design their own welfare replacement programs, as well as the block grants to support them. As a result, hundreds of thousands of families are climbing out of poverty and pursuing their piece of the American dream.

Then 3 weeks ago, 3 years after the act was passed, the Department of Health and Welfare in Washington passed the rules saying a lot of the things we are doing are just not proper. Even though we were moving and doing things, the rules reduced our flexibility, 3 years after a lot of us had already had the act up and running.

CSG and the Nation's Governors urge Congress and the administration to reject any proposals that reduce the funding or restrict the flexibility for welfare-related programs.

But I would like to compliment you, Senator, and all of the Members on this Committee because much has been accomplished since the 1997 meeting, but much more remains to be done. I was very happy yesterday with our bipartisan meeting, in which you were there, Senator Thompson and Senator Voinovich. I thought it was a wonderful bipartisan meeting in which we were able to put our case on the table and you responded, I think, very eloquently.

So already in the 106th session of Congress, the House has passed H.R. 350, the Mandates Information Act, H.R. 409, the Federal Financial Assistance Improvement Act, and H.R. 439, the Paperwork Reduction Act.

The Mandates Information Act clarifies the point of order provision of the Unfunded Mandates Reform Act, applying the orders to any cut or cap in entitlement programs, such as Medicaid, food stamps, and child nutrition, unless States are given new or expanded flexibility to manage the cut or cap.

The Federal Financial Assistance Improvement Act will require the Office of Management and Budget to develop uniform common rules for 75 cross-cutting regulations, and under this legislation, OMB must also develop electronic filing and management of grants to reduce the paperwork.

Just 2 weeks ago, this very Committee held hearings on S. 746, the Regulatory Improvement Act. The Council of State Governments believes that S. 746, cosponsored by at least three Members of this Committee, is a very good move in the right direction. It will provide needed consultation with State and local officials when Federal agencies promulgate new regulations and will require risk assessments and cost-benefit estimates for such regulations.

Additional proposals and ideas that are circulating that may further impact the current state of federalism, on March 10, 1999, the "Big 7" State and local organization principals signed a letter that was forwarded to Congress in support of the Regulatory Right-to-Know Act of 1999. By calling for an annual report to Congress by the President and the Office of Management and Budget, which analyzes the impact of Federal rules on Federal, State, and local governments, this bill encourages the open communication between the Federal agencies, State and local governments, the public, and Congress regarding Federal regulatory priorities.

As you know, Mr. Chairman, the staff of the "Big 7" State and local organizations have also been collaborating with staff members of this Committee in an attempt to fashion legislation to protect and to reiterate the partnership between Federal, State, and local units of government. CSG believes that it is important to bring such legislation to fruition, and among the principles we would like to see embodied in such legislation would be prior consultation with State and local elected and appointed leaders in drafting the Federal legislation, the regulations, and the Executive Orders with an inter-governmental impact.

Federalism partnership legislation should provide a Federal assessment through federalism impact statements and provide a form of judicial review for enforcement. Ultimately, CSG believes a true

federalist partnership must reflect the intentions of the Tenth Amendment, whereby States were granted deference when the Constitution failed to explicitly empower the Federal Government.

So, as State leaders concluded in the 1997 conference on federalism, in order for our country to be an innovator at home and leader abroad in the 21st Century, I believe it is imperative that our unique Federal partnership devise improved divisions of labor and achieve strategic inter-governmental restructuring best suited to the changing public policy circumstances that confront us.

The States have shown, with the limited experimentation that the Federal Government has allowed, that we can manage complex problems, we can put our ideas to work, and we can do this, reconnecting the American people with their government.

Devolution will have a profoundly positive impact on the delivery of government programs and services as the States compete with one another to devise the best system. Its impact on the political process, however, will be equally profound, nothing less than a restoration of the American people's confidence in their government.

So, again, I thank you for this opportunity to speak with you today and I look forward to our ensuing conversation.

Chairman THOMPSON. Thank you very much, Governor. Governor Leavitt.

TESTIMONY OF HON. MICHAEL O. LEAVITT,[1] GOVERNOR, STATE OF UTAH, AND VICE CHAIR, NATIONAL GOVERNORS' ASSOCIATION

Governor LEAVITT. Thank you, Mr. Chairman. I appreciate the opportunity to appear before you on behalf of the National Governors' Association.

Federalism and the partnership between ourselves and the National Government is obviously a top priority of ours. We have witnessed over the course of the past several years substantial progress and we want to acknowledge that. We have made major progress in moving from a micro-managed relationship, often imposing a lot of Federal bureaucratic rules, to one that moves toward performance goals and we think that is a very positive outcome.

Congress has given us the Safe Drinking Water Act. We stopped the wholesale passage of unfunded mandates, reduced Federal micromanagement. It has given us block grants in welfare and transportation and child health care, etc.

We celebrated recently in our State the success of our children's health insurance plan. With some flexibility that the Congress gave to us, we were able to develop our own plan and not use Medicaid. We are able to provide health care, as a result, to twice as many children and provide them with the same health insurance plan that my children have as the Governor of the State, twice as many as we would if we were under Medicaid simply by giving us flexibility, and I think it is a grand example of the way we can work together to provide more efficiency and innovation.

This revolution has often been referred to as the devolution revolution. Regrettably, the magnitude, I fear, of this undertaking has

[1] The prepared statement of Governor Leavitt appears in the Appendix on page 153.

been exaggerated at times. A lot of the devolution initiatives have been better in theory than they have been in practice. A lot of the initiatives have been limited in their benefit by imposing a lot of new burdens on States as conditions of funding.

There is a new problem emerging. We, for years, focused on the area of the unfunded mandates. Today, my major purpose is to point out to you that in place of the unfunded mandates, the new trend is one of preemption, where the States are having their innovation and their capacity and flexibility withdrawn in a different way.

When we were dealing with unfunded mandates, the National Government was compelling the State to do something. With the preemption, they are preventing us from doing what we need to do. Both have the same effect. Both move us away from the basic federalist proposition that our founders developed. Much of this is being done, I might add, in the name of globalization and a movement into the knowledge age.

I would like to suggest that we, as a people, are blessed with what could be the perfect form of government for the information age. The world is beginning to work like a group of network PCs. We continue to move forward as a Nation as though we are trying to form ourselves into a giant mainframe.

I would like to suggest that that metaphor, whether it is affected by unfunded mandates or by preemption, is the same. The mantra for the 21st Century must be central coordination but local control. We need to think of ourselves as a group of networked PCs. It is the power of the network. It is the power of the innovation that is set forward, the multiple that is created by a set of central capacities with everyone having the capacity to innovate on their own that makes this a powerful system. We may have the perfect form of government for the information age.

Once State authority is taken away, it is very seldom returned. Today, I would like to suggest on behalf of the National Governors' Association a series of five principles that we believe will well suit us as we move into the next millennium.

The first one is that the principles of bipartisanship must be followed by elected officials at every level.

Second, that the partnership between the State and the National Government has to be based on early consultation on anything that would affect the States. That is an element of cooperation in the development of this system of networked PCs.

The third is that a legislative proposal's impact on federalism needs to be transparent and fully disclosed before the decisions are made. We have found over time that on many occasions, that the regulations we have to deal with are either imposed by the bureaucracy later or by intent language that was never part of the debate as we go through developing and writing legislation.

The fourth principle would be that this partnership needs to be based on an interdependent nature of our government, and that demands an attitude of the highest respect, but also a deference toward State and local laws and procedures that are closest to the people. That is the spirit of the Tenth Amendment. If it was not specifically reserved to the National Government, the power of the people would be respected and the States.

The last one would be that these elements of our partnership should have some means of enforcement.

Now, in my formal testimony, I point to a number of different examples of legislation that you are dealing with that we believe would move this forward. I will point to one today, and that is the Mandates Information Act, H.R. 350 or S. 427. The bill would clarify that the point of order provision of the Unfunded Mandates Act also applies to any cap or cut in an entitlement program. The States are deeply concerned that programs such as Medicaid, food stamps, and child nutrition will be adversely affected unless the States are given new or expanded flexibility to manage any kind of cut or cap. There are several others that I have mentioned.

I will just summarize by saying our message to you and also to the President is we need to move forward with an enforceable federalism partnership between State elected officials and elected officials at the National Government, all levels, and we invite you to join us in reviving this working partnership. Thank you, Mr. Chairman.

Chairman THOMPSON. Governor, thank you very much.

Sitting here listening to you gentlemen, it occurred to me again that we could not have two more representative people in this country to talk about this issue. You have both been innovators in your own States and obviously not only know what you are talking about, but you have put it into effect and shown what can be done at the State level when given the opportunity.

First of all, Governor Leavitt, I appreciate your pointing out something that I think is hitting home to so many of us here and that is that we are going from having made some progress in the devolution stage of things to running into additional problems with regard to the preemption stage of things. Of course, we have legislation that we are discussing right now, as Governor Thompson indicated, that hopefully will address that, so that at least we take the time to consider the ramifications of what we are doing and face up to it, and second, make sure that if we are preempting the States, that we acknowledge that and give the courts some guidance as to what we are doing.

Staying on the devolution part for a minute that we are all proud of, the many things that have happened there, Governor Thompson, of course, is known far and wide for his innovation with regard to welfare reform in his State. You mentioned the Safe Drinking Water Act, health care, the Unfunded Mandates Act, all of those things. I am wondering what your assessment is as to how we are doing on the devolution side of things.

We know we have some problems. You mentioned, Governor Thompson, the issue you have with regard to welfare. I would like to know a little bit more about that in your State, the Federal interpretations there. The Unfunded Mandates Act, you mentioned, Governor Leavitt, still has interpretations with regard to how the Medicaid situation will operate in your State.

We have also seen that we give lip service to things—the President's Executive Order on federalism. The GAO found that for over 11,000 rules issued between April 1996 and December 1998, the agencies that are conducting federalism assessments for only 5

rules, 5 out of 11,000. Of course, it calls for federalism assessments to be made when federalism issues are involved.

So we have a lot of press conferences and give a lot of lip service, but the real question is, how are we really doing? Obviously, we have made some progress we are proud of, but how is it working? What are your accomplishments? What have been your accomplishments? What are your concerns? Where do we go from here, with the block grant situation, moving more and more to that. How is that working? Give us your assessment on how devolution is working so far, an overview, obviously, in your State. Governor Thompson.

Governor THOMPSON. Thank you very much, Mr. Chairman. Devolution in regards to the TANF Act is working, evidenced by the number of people that have been moved off welfare in States all across America, from Maine to California to Florida to Washington.

The problem that we are running into right now is that the Department has issued some rules, and when you have a complete reduction in the cases like we have in Wisconsin—we are now down from 100,000 families down to 8,500 families, and those families, 80 percent are in one county, 70 percent are minorities, two-thirds of those individuals have some kind of drug or alcohol problem or a combination of both, 50 percent do not have a high school education, and 40 percent have never worked. So they are really the hardest to place.

We are spending a lot more money on individual cases, but the reduction, the total reduction, in order to maintain our effort, because we have reduced it by so much, we have to waste a lot of money just on those individual cases to satisfy the requirements, whereas I would like to be able to take some of that TANF money and use that money to help some people that are just off of welfare, to be able to continue to monitor them, continue to encourage them to work, continue to improve their education so that they can get better jobs and so on.

But because the maintenance efforts are so restricted under the rules, we cannot have that. Some things that we put out there that we used to get maintenance effort credit for, the rules that have come down now, 3 years after the act was passed, do not allow us to have that maintenance of effort. So we are getting penalized because we were innovators and doing the right thing, we thought, but now the Federal Government comes in and takes it away. They gave it to us on one hand, take it away from us with the second hand.

So devolution is working in welfare reform completely, but now the rules, or the preemption that you and Governor Leavitt have talked about, has taken back some of that flexibility and that is what concerns me a great deal.

Chairman THOMPSON. And it really seems like it happens under the radar screen. We have the big announcements, about welfare reform, but then you say 3 years later, the rules are still coming that dictate——

Governor THOMPSON. The first time the rules came out, the rules were not out for 3 years.

Chairman THOMPSON. Three years?

Governor THOMPSON. Three years. It is after the fact. We have gone so far down the road, and we have been encouraged to do that by indications from the department.

Chairman THOMPSON. Sometimes, do you find the rules are inconsistent with what you believe to be the intent of the legislation?

Governor THOMPSON. Absolutely, and inconsistent from what we have been led to believe is the position of the Department. But once the rules are finalized, they have taken away the flexibility and have taken away the opportunity for us to continue a program that we had been given the green light, a tacit green light, by the Department, and that to me flies in the face of what you wanted as the Chairman of this Committee and as a member of the Senate when you passed the TANF Act.

Chairman THOMPSON. Governor Leavitt.

Governor LEAVITT. Governor Thompson has responded, I think, with some wonderful specifics. If I could address your question in a more historic way, more dealing with the history of this issue, obviously, federalism is based on the idea that there would be healthy tensions between the States and the National Government, that both would have tools that would enable us to represent our interests.

I would like to suggest to you that a major part of this problem is the States have been really rendered anemic in our capacity to do our constitutional duty. We were historically given four tools to represent the interests of the States and the people against the power of the National Government, as a protection.

The first was the Tenth Amendment. No one would dispute, I believe, the fact that over the course of the last 50 or 60 years, the Tenth Amendment has been emaciated by the Federal courts and that our capacity to use the Tenth Amendment, until recently, has simply gone unnoticed by the Federal courts.

The second was the direct election of the U.S. Senate. Now, I would not advocate that we go back to the legislatures appointing them, but I think we would all agree that the day that the States gave that up, we gave up a powerful tool to be able to call our representatives back to say to them, we do not like what is going on. You are not representing our interests directly. Therefore, a lot has changed. We have lost that tool.

The third was the amendment process. The amendment process looked good on paper, but the reality is, the capacity to amend the Constitution of the United States to rebalance this national power simply is very lopsided because all the power to do that resides with the National Government.

The fourth one was the will of the people. The founders, I believe, knew that there was a need on the part of people to be governed closest to them. The devolution, if you will, revolution was about people saying, we desire to have more power at the local government level. You do not hear it spoken of very much and there is a natural creep that will occur by the Federal Government and the States literally being rendered anemic. Because of our tools now being gone, we will inevitably be overrun by the National Government and the kind of bureaucracy that Governor Thompson speaks of.

That is the reason we come today to appeal to you that we need to have enforceable federalism. Without it, it is inevitable. Whether it is preemption or whether it is mandates, the effect will be the same.

Chairman THOMPSON. Thank you very much.

I know you have to leave shortly. I thought my time was running a little short here and I checked and found out that staff is taking care of you and cutting my time back, so be it.

Senator Lieberman.

OPENING STATEMENT OF SENATOR LIEBERMAN

Senator LIEBERMAN. Thanks, Mr. Chairman.

Let me first, if I may, as a matter of process—you referenced to a GAO study on the implementation of the federalism, Executive Order No. 12612. At GAO's request, OMB has prepared a letter providing GAO with its views on that ongoing study and the folks at OMB have asked me to request that this letter be placed in the record, also, which I would like like to do at this time.[1]

Chairman THOMPSON. It will be made a part of the record.

Senator LIEBERMAN. Thanks, Mr. Chairman. Thanks very much for convening this hearing. Thanks to Governor Thompson and Governor Leavitt for being here. Two very thoughtful opening statements.

I appreciate that the hearings are being convened, because they do give us a chance to step back and consider in a broader context some of the judgments we naturally make on an ad hoc basis as we consider the whole range of legislation. We sometimes explicitly debate federalism questions by that name, using terms like preemption. For instance, in product liability debates and the Internet sales tax moratorium, which we were involved in together, at least on the discussion stage, Governor Leavitt, there is a lot of focus on the appropriateness of preemption. In other cases, of course, we do it but we do not talk about it. It is implicit. So this is a very important opportunity that these hearings give us to look at the big picture.

There is a third panel here of scholars, Professor Galston and Professor McGinnis, that I thought provided very good overviews which are helpful as we go through this. Professor Galston's paper points out historically in this century that you might say we have gone through two different periods. One was when for reasons of history, and you might say necessity, the power of the Federal Government grew, most notably the great depression of the 1930's when the problem went beyond the capacity of the States and localities to handle, and then, of course, the Second World War.

But in the more recent decades, though it may not look like it from the State level—and I came here after 16 years in State Government, 10 years as a State Senator and then 6 years as Attorney General—that the trend has been much more in the direction of the devolution revolution, but there is this tension that I think the Framers not only foresaw but intended.

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[1] The letter dated May 4, 1999, from the Office of Management and Budget appears in the Appendix on page 212.

Your metaphor, Governor Leavitt, of not making this a mainframe but keeping it a network of PCs is a good one. I suppose on the other end, the other extreme that we should avoid, is to break the network, that is, to not just have millions of PCs out there operating on their own because of the weakness of the National Government.

On the question of preemption and inappropriately intruding on the role of the States and local governments, last Congress, as you know, we considered so-called takings legislation, which I thought posed a direct threat to the ability of local governments to exercise their authority in the area of zoning and land use planning. In States like mine, our local governments are working very hard and are very proud of and very protective of that authority, and right now, for instance, there is a heavy emphasis put on acquisition by the local governments, and State, of open space land. I was privileged to join with the Chairman in working to defeat this legislation.

But in other instances, deciding whether Congress should prevent State and local governments from acting becomes, at least for me, a more difficult question. This goes directly to something that Professor McGinnis and Professor Galston talk about in their papers, which is the intention of the Framers in creating the Federal system to protect continental free trade, that it is on a continental-wide basis, national trade.

Professor Galston in his statement urges us to be open to the possibility that economic and technological changes of our day, such as telecommunications, the Internet, interstate banking, may require a reconsideration of some of the established Federal-State relations in certain areas.

This is a very complex question, but with the opportunity to step back and look at the big picture, I wonder if you have any suggestions about how we should weigh our varying responsibilities, Federal and State, for doing what the Framers clearly intended us to do, which is to maintain not only a continental market but a free market, as it were, while at the same time not encroaching on the appropriate areas of responsibility for State and local governments. I am thinking here specifically of the area of commerce, interstate commerce. Does either one want to take a shot at that? Governor Leavitt.

Governor LEAVITT. I actually do have some thoughts about that, Senator. I think that you have identified what may be the challenge of this generation of governance. We are approaching what I think is the new frontier of federalism. We may have to reinvent federalism, given the fact that we are now in a time when borders have less constructive meaning than they did before. We are having to find new ways of creating checks and balances in a Nation that has relied on borders that have defined us, and we no longer may have that option.

I would like to suggest one way that that can occur best. Aristotle used to speak a lot about the golden mean, which he defined as being the place between two vices, the natural tension between them. That is the basis of our federalism.

I still believe that the place that you are referring to is that golden mean between them and it can only be found if both the States

and the National Government have the capacity to resist one another in their effort to find it. The big problem we have right now and the reason we are drifting toward a mainframe type of government as opposed to a group of network PCs that really characterizes the information era is that the States are anemic. We do not have the capacity to resist the National Government. We are essentially told what we will do in almost every case, and the only resistance we have is to come to places like this and talk.

As we try to pioneer this new frontier of federalism, we have to find ways for the States to be able to resist the Federal Government, to find those places, or we will end up with a system of government that will not be consistent with our point.

Senator LIEBERMAN. Thank you.

Governor THOMPSON. Senator, if I could just add something very quickly, something that has really bothered me and I think it is starting to really concern a lot of people, I know it has Governor Leavitt, who has been a leader in this, but the fact of the new telecommunications, the new Internet commerce that is developing, there is the tremendous impact that is going to adversely impact the States. That is, as this new commerce is developing, the sales taxes that States are going to receive are going to diminish and it is going to get worse. The only people that can really help us are you.

We are so fearful of the situation where we may end up being like the European common community, where the States in Europe have to go to the Federal Government to get all their revenue and you have to fund us because you have taken away our sales tax resources. I do not think you want that. We do not want it, and are very concerned about that. So we need some way to be able to communicate with you that we have to redevelop this federalism.

The second point I would like to make is that we also have to do something as it relates to the administrative agencies, because I like dealing with you and I can usually convince you to go part way with the position of the States, but once it leaves your hands and goes over to a department, to some bureaucrat there that is going to promulgate the rules, like they have in TANF, we are left out. We have no recourse whatsoever. So we need some sort of assurance, some sort of protection under this new commerce and under the administrative agencies to be able to get our views out there and to be able to have an equal voice somehow with the Federal Government.

Chairman THOMPSON. Gentlemen, the clock has run on our vote, I think. If we do not leave right now, I do not think we are going to be able to vote.

Senator LIEBERMAN. Thanks for your very thoughtful responses.

Chairman THOMPSON. I know that Senator Voinovich and Senator Collins are going to be back, if you would bear with us. I know you have to leave early.

Senator LEVIN. Could I find out when they do have to leave? In terms of my return, I would be interested. What is your schedule?

Governor LEAVITT. Regrettably, Senator, I will have to depart soon.

Chairman THOMPSON. I think we were talking about 10 o'clock.

Senator LEVIN. This is deja vu from yesterday for me, I am afraid. Usually, deja vu goes back a few years, but this does not.

Governor THOMPSON. As Yogi Berra says, deja vu has got to be repeated all over again.

Chairman THOMPSON. Whichever Senator returns first will reconvene.

Governor THOMPSON. Thank you very much.

Chairman THOMPSON. Thank you very much. I guess I will not get a chance to go over my chart with you, but I put that up there for your benefit, so just absorb that and use it in whatever way you might want to.[1]

Governor THOMPSON. Thank you, Senator.

[Recess.]

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH [presiding]. We will reconvene the hearing. The other Senators will be back in a couple of minutes. One of the real challenges of being a new Senator is figuring out how you can get to the floor in the fastest fashion without getting lost.

We were in the question period and Governor Thompson had to leave. Governor Leavitt, in terms of preemption legislation, what are you most concerned about in terms of preemption that is going on right now on the Federal level?

Governor LEAVITT. Senator, may I say that, I think, for the most part, it is the trend and the practice generally that concerns me. There is a momentum about a willingness to do it. It is in taxation authority of local government. We saw that potential with the Internet Tax Freedom Act. Gratefully, it was mitigated substantially from its original form. It is in the area of utilities, in the area of education—it is a new trend.

Frankly, I think it is based on—we have talked about unfunded mandates. That is a philosophy of compelling State and local governments to do things. In many cases, preemptions are a desire to prevent State and local governments, but both of them have the same. Those are some of the categories I would point to.

Senator VOINOVICH. I know that many people are in support of Senator Thompson's preemption legislation. How do you think that would have made a difference in terms of the issue of this Internet taxation problem, or Internet Tax Freedom Act?

Governor LEAVITT. It very clearly impacts the States' capacity to provide for our basic services. If the States lose the capacity to tax, the States lose the capacity to govern.

Initially, the original legislation that was proposed would have literally withdrawn all local taxation authority and then would have, by legislation, given back minor pieces. I think under Senator Thompson's proposal, that could have never reached serious consideration in the Congress because the States would have been able to ask their friends in Congress to be able to impose the teeth of the law and it would have given us a means by which we could have pushed back. The tension, the healthy tension, the checks and

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[1] The Chart entitled "Federal, State, & Local Taxes Collected Per Person," submitted by Chairman Thompson appears in the Appendix on page 214.

balances that were intended by our system would have been provided. The mantra needs to be enforceable federalism.

Senator VOINOVICH. In other words, if the preemption legislation had been in effect, the people that drafted the Internet Tax Freedom Act and the committee that reported it would have been really forced at least to look at the issue of preemption——

Governor LEAVITT. That is correct.

Senator VOINOVICH [continuing]. Probably something that did not occur to them until after they were off and running.

Governor LEAVITT. Plus the consultation, I think, would have been part of pointing that out.

Senator VOINOVICH. One of the things in which I am interested, and I hate to get into specifics, but there is some difference of opinion among some of the Committee Members in terms of whether a rule of construction—a legislative piece that says the presumption is that this legislation was not meant to preempt, or regulation was not meant to preempt, unless it said so explicitly, would be adequate without having a point of order. Would you like to comment on that?

Governor LEAVITT. I am not able to comment on the parliamentary throw-weight of the provision, but I can say that all the construction provision is a reflection of the Tenth Amendment. It is a statutory acknowledgement that the National Government has a limited role and that unless it is an enumerated responsibility of the National Government, it should be left with the States and the people. That was a condition of our Constitution in writing. It is part of the Constitution and we ought not to blanch at all in having Federal legislation that acknowledges and gives it its full due.

Senator VOINOVICH. The administration, as you know, last year changed their federalism Executive Order and then backed off from the changes. Could you bring us up to date on just where that is in terms of the White House and negotiations between the State and local government organizations?

Governor LEAVITT. The White House did propose a new federalism Executive Order that was deeply alarming to the States because it—well, first of all, it removed all reference to the Tenth Amendment and would have made substantial changes in the interaction between States and the Federal Government. By retracting it, they set into place a new process where they are working right now with the Big 7 to determine if changes are needed to the existing federalism Executive Order. They believe that there are changes necessary. The States and local governments would argue that there are no changes needed to the existing federalism Executive Order. There are no changes that are imminent, but there is an ongoing discussion between the Big 7 and the White House.

Senator VOINOVICH. Do you think anything is going to be done prior to the President's term of office ending?

Governor LEAVITT. That is unknown to me, but again, I would say that the position of the States and the National Government is that the burden needs to be placed on why it needs to be changed. We see very little reason for us to make any substantial change in the existing federalism Executive Order that has served us since the Reagan administration.

Senator VOINOVICH. I, for the life of me, cannot understand, with all the problems that they have, why they are bothering with this issue, particularly when there is such a unified opinion among State and local government officials that it ought to remain as is. That deals with this problem, because it talks about Federal agencies and the way they ought to approach things, does it not? If the Federal agencies were familiar with the current federalism Executive Order and honored it, some of the things that this legislation proposes to deal with might not be problems.

Governor LEAVITT. The current federalism Executive Order, if it were honored, does essentially what the construction rule that you spoke of earlier would do for legislation. It indicates that unless there is a clear, enumerated responsibility of the National Government, the National Government does not have a role and ought to honor the prerogative of the States and local governments. The amended order, as it was proposed, would have reversed that completely.

Again, it is a matter of where the presumption is. Their proposed order would have reversed the presumption. I would argue that, over time, Congress has reversed the presumption. That is the reason that there is a need for this legislation, because it would formally reverse the presumption again to be what was consistent with that of the founders, which is the Tenth Amendment. Unless it is a specific enumerated power, it belongs to the States and the people.

Senator VOINOVICH. I think one of the things that would help me, and I think Members of the Committee, would be to have your Big 7 organization come up with some of the most potentially onerous preemptions that are being considered currently and also to perhaps share with us some regulations that either have passed or are being anticipated that highlight why this kind of legislation is needed, because so often, when you do not have specific examples of it, you do not understand the problem.

Governor LEAVITT. Senator, that is something we would be happy to inventory and provide.

Senator VOINOVICH. The other thing that I am interested in is the unfunded mandates relief legislation, and for the most part, it is working in Congress. However, it was also supposed to deal with regulations in the various departments. I think where those regulations were over $100 million, it required consultation with State and local government people. Would you like to comment on how that is working?

Governor LEAVITT. Well, it is not. We heard earlier from Senator Thompson that in the last 11,000 Federal orders, only 5 have had federalism assessments, only 5. So it is clear to me that provision of the law is being essentially ignored.

Senator VOINOVICH. I might suggest that perhaps the State and local government coalition convey that to the President and to the administration. I think so often what happens, as you can well imagine, being a governor, is there are a lot of things that are scurrying around in agencies that you are responsible for, but it never gets to the top. People stop you and say, "Gee, did you know this," and you look at them and say, "I do not know anything about it."

I think perhaps part of the problem is that, too often, we do not get that message to the White House and share the concern about, for example, Donna Shalala and the new regulations on the TANF legislation and how we think it would restrict the ability of States and remove some of the flexibility that we have had to do some innovative things that have really made a difference for the people that are receiving welfare in our respective States and have helped take them off the rolls.

Governor LEAVITT. Senator, I think you make a very valid point, in that there is in any government a culture, and it takes a long time for the culture to be changed. We have gone through a period of more than 35 years where the culture of federalism has essentially been squeezed out.

The legislation we are talking about, the whole idea of a devolution revolution, was really about the process of beginning to reinstill federalism as a meaningful part of the culture of our government. It is a mindset. It is something that you carry in your mind and in your heart, not just on the statutes. It is a desire to have things conducted at the local level where they can be. We have operated with a default to the opposite. All roads have tipped to Washington.

Until we are able to instill in the hearts and minds of the bureaucracy, and then have enough capacity for the States to formally resist, that will continue, and that is why the efforts that you are making and others on this Committee are so deeply appreciated by those of us in States and local governments, and I would argue by the people of this country, because there is an innate desire on the part of people to govern themselves. This culture of federalism that has been squeezed out of our government is in direct confrontation with that idea.

Senator VOINOVICH. The preemption legislation, in my way of characterization, would be a defensive effort. We have had great success with devolution of the welfare system and I do not think Congress fully appreciates what States have done with Medicaid.

I know in our State, 2 years ago, our Medicaid costs were less than they were the year before, for the first time in 25 years, and the Federal Government is saving a great deal of money because of that. That is because of waivers and the elimination of the Boren Amendment.

But I think that some of that information ought to be made known to the members of the Senate, because, again, the Boren Amendment meant nothing and we got it changed, but States and local governments should be really emphasizing how much money the Federal Government is saving because of what we have done in Medicaid.

Governor LEAVITT. We did not even get started on Medicaid the way we should have. There has been progress, but Medicaid remains one of the most inefficient, wasteful things that the National Government does. It is a great thing to be able to take care of the health care needs of the poor, but if the Federal Government would turn Medicaid over to the States and allow us to manage it in the way we have welfare, we would be talking about hundreds of billions of dollars of savings over time.

I referenced earlier the child health insurance plan in our State that we were able to implement and not be required to use Medicaid. I do not know if you were here, Senator, but we are able to cover in our State twice as many children, double the number of children, and give them the same health plan that the Governor of our State has for his children than if we were forced to use Medicaid.

We could do the same thing for the working poor. If the National Government would give the State of Utah a waiver that would allow us to manage our Medicaid program, we could begin covering the lives of the working poor. Today, there are many in our State who work hard but do not have health insurance because they cannot afford it. The recipe for having health care in our State is oftentimes not to work, and that is wrong.

Senator VOINOVICH. I think, again, you should be pointing out to the members of the Senate and Congress about how the CHIP program that the governors fought to have flexibility for has allowed you to do this. In our State, in Ohio—we are going to 200 percent of poverty and the people who are participating—it is still a Medicaid program because we have had some good experience with it, but the fact is, they are paying part of it now. I think we are reducing some of the benefits a little bit. But because of the CHIP program, we have had the flexibility.

So I would just suggest that as often as you can, you ought to highlight how this devolution is, indeed, helping the Federal Government with their financial problems and also how it is helping you to do a better job in taking care of our respective customers, because so often, as I am sure the Chairman knows, the stuff is all on pieces of paper and if you do not have the examples of it, then you just kind of take it for granted.

Governor LEAVITT. Thank you for the opportunity to do it today.

Senator VOINOVICH. I yield to the Chairman, and I understand you have a plane to catch.

Chairman THOMPSON [presiding]. Yes, Governor, you have already stayed past the time which you indicated that you could, and we appreciate that very sincerely. I am not going to detain you any longer.

Governor LEAVITT. Mr. Chairman, may I present both of you with a copy of a report that has been done by the Big 7 of the seven State and local organizations entitled "Governance in the Digital Age, The Impact of the Global Economy, Information Technology and Economic Deregulation on State and Local Government." It is a series of reports that we are putting out that I think you would find very helpful in your discussions.[1]

Chairman THOMPSON. Very good. We will make both of those a part of the record.

Governor LEAVITT. Thank you.

Chairman THOMPSON. Thank you very much, Governor. We sincerely appreciate your being here.

I would like to turn now to our second panel. The first witness will be the Hon. Daniel Blue, Jr., the senior Majority Leader for

[1] The publication submitted by Governor Leavitt is retained in the files of the Committee.

the North Carolina House of Representatives and the President of the National Conference of State Legislatures.

Our second and final witness on this panel will be the Hon. Clarence Anthony, the Mayor of South Bay, Florida, and the President of the National League of Cities.

We appreciate you traveling here today, gentlemen, to share your testimony with us. Representative Blue, would you like to begin, please, sir?

TESTIMONY OF HON. DANIEL T. BLUE, JR.,[1] MAJORITY LEADER, NORTH CAROLINA HOUSE OF REPRESENTATIVES, AND PRESIDENT, NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. BLUE. Thank you very much, Mr. Chairman. Good morning to you and Senator Voinovich.

As stated, I am serving this year as President of the National Conference of State Legislatures and it is in that capacity that I appear before you today representing the 50 States as well as the commonwealths and territories. I also appear today, Mr. Chairman and Senator Voinovich, on behalf of the Big 7 organizations. As you know, we have over the last several years had close consultation with you on many issues, and, in fact, over the last couple of days, have consulted over many common issues.

In response to that, or with respect to that, we have basically favored six bills that are pending before the Congress now. Some of them have been alluded to by Governor Thompson and Governor Leavitt a little bit earlier. This morning, I want to limit my discussion to the last of the six bills that we talked about in the written submission that I made to you, and that is the Government Partnership Act. We think that passage of that is important because it deals with the problem of Federal preemption of State and local law, and NCSL and the Big 7 truly believe that that is the most vexing of our current problems in dealing with State-Federal relations.

I want to, before I give the reasoning, state that there are three things that we are trying to do in the legislation that we are supporting. We are calling for legislation that deals with the problem of preemption of State law by doing the following three things:

The first is that it would provide the Congress with more information and better information about the preemptive effect of proposed legislation before that legislation is enacted.

Second, it would establish a process for making it much clearer to agencies and the Federal courts as to what the Congressional intention is when legislation is enacted and especially what that Congressional intention is with respect to the area of preemption.

Third, we think that there needs to be some procedural aspect that allows you to know when proposed legislation has the effect of preempting State or local authority.

Let me just hit a few high points because we think that preemption, as we have experienced it over the past several decades, is a direct threat to our constitutional system of federalism, and the problem is two-fold.

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[1] The prepared statement of Mr. Blue appears in the Appendix on page 163.

First, let me say that it results from the propensity of the Congress, of the courts, and Federal agencies to preempt State law without carefully thinking about what the impact is and how it may affect State and local governments and their ability to participate in this Federal system.

But second, and I think more pervasively, it results from Federal agencies and the courts in entering into this field of implied preemption, where there is no clear indication as to what the Congress may have meant. As you know, there has been a whole body of law, case law, that has developed on this doctrine of implied preemption. So we think that there needs clearly to be some procedure that makes clear what Congress means when it enacts laws and makes clear whether it intends to preempt the field so that State legislatures will know that we are forbidden from entering into those areas.

The cumulative effect of all of this Federal preemption in both regards, one, when there is simply not sufficient information, or at least not sufficient thought as to what the ramifications are, and second, not the direct Congressional preemption but with Federal agencies and with the courts, we think that it has reduced the effectiveness of State and local governments. We simply have too many policy options taken away from us.

As you know, the benefit of the concept of federalism, as Governor Leavitt talked about from the Tenth Amendment, is it gives us the opportunity as State and local governments to experiment, to figure out specific solutions for specific problems and to adjust those as things change. We can deal with them much more rapidly than you can at the national level. Our agencies are better suited to deal with them more quickly and deal with their unique nature. So we think that the ability to test something in one jurisdiction is what makes it basically our ability to make this system work as well as it does.

In our own organization, that is, in the National Conference of State Legislatures, we have two major committees, one, the Assembly on Federal Issues, the other, the Assembly on State Issues. The Assembly on State Issues essentially deals with ideas that have started in one State or one locality and it sort of works its way through the marketplace of ideas with legislative bodies around the country. We constantly borrow or appropriate each others' ideas that work, ideas that are unique to a specific State, a best practices approach. I think what we are coming to find is that there is an inability to always use these best practices because some preemptive effort, quite frankly, limits our ability to be creative.

One would argue that we have a .900 batting average when it comes to stopping some of these bills over the last decade or two that may have been preemptive, but the cumulative effect of all of that, even if you have a .900 batting average every year, is at the end of a decade, you still have had 10 areas preempted. Slowly but surely, that takes away the ability of those of us at State and local government to be as effective as we could.

Let me suggest that the harm done is perhaps even more considerable than I am alluding to, because, again, I talk about the slowness and the sluggishness of the process by its very nature when

you have preempted us at the State level and decide to transfer power up to the Federal level to deal with a broad range of issues.

Two other things and I will close, because I think that I want you to understand clearly that I grew up in the American style and NCSL is not challenging the ability of the Federal Government to preempt or the wisdom of the Supremacy Clause. I happen to agree with it totally. It would not matter if I did not. But the point is that we are not challenging or questioning the wisdom of preemption.

What we are simply saying is that where there is a direct conflict, as articulated by the Congress, or even a direct conflict as you ran into in *Gibbons v. Ogden*, we cannot challenge whether you have taken away the States' ability to operate in that area. But where there is not a direct conflict between State and Federal law, when there is not a clear articulation of the intent of Congress to take away our ability to act in an area, we propose that there ought not be any presumption of preemption or there not be any preemption allowed.

What we need to do, to reiterate the three points that I raised earlier, is have legislation that says, before Congress will preempt State law, it will be well-informed about the implications, it knows fully what the implications are to State and local government, so that there is a discussion about it, some consideration of the Tenth Amendment, some consideration of the roles that we play in this Federal system.

Second, that the internal process that you develop through this legislation would make it clear to the agencies and the courts when you intend to preempt, again, wiping out the field of implied preemption, which has become so pervasive in the whole area of preemption.

And third, by giving guidance to the courts and to the agencies by simply saying with a strict rule of construction, when we have not said as the U.S. Congress that we intend to preempt, then there is an irrefutable presumption that there is no preemption. As a practical matter, I think that really goes to the heart of the problem, because, again, if you review the case law closely, you will find that it is only in the implied preemption cases where we are vastly losing our ability to deal with the issues facing the people of our various States and our various localities.

So if, in fact, this Senate and the Congress takes action along those three lines, we think that it will address the very serious flaws that we see in the current approach on preemption.

I want to thank you, Mr. Chairman, and you, Senator Voinovich, for giving us an audience from the standpoint of the NCSL and the Big 7 to talk about these issues that have been vexing and perplexing issues to us, at least during my tenure in the legislature, which covers about 2 decades. I think that if you enact this kind of legislation you will strengthen the hands of State and local government, and you will also strengthen the hands of the Congress, especially as it relates to the courts and to the Federal agencies, because your intention as you enact legislation will be specific and clear and will give them direction as to how they ought to proceed.

I thank you for giving me the opportunity to testify before you today.

Chairman THOMPSON. Thank you very much, Representative Blue. I sincerely appreciate that.

We will now call on Mayor Anthony. I am going to overlook the fact that Mayor Anthony's son, on behalf of the University of Florida, beat the University of Tennessee, back a couple of years ago practically single-handed. He reminded me of that yesterday. I am going to overlook that fact and welcome him here today. Mayor Anthony, I appreciate your being here.

TESTIMONY OF HON. CLARENCE E. ANTHONY,[1] MAYOR, CITY OF SOUTH BAY, FLORIDA, AND PRESIDENT, NATIONAL LEAGUE OF CITIES

Mayor ANTHONY. Mr. Chairman, I feel more welcome now that you noted that point, and I will congratulate you and Tennessee for your year of champion reigning. It is a great opportunity.

Good morning, Mr. Chairman. For the record, my name is Clarence Anthony. I am Mayor of South Bay, Florida, and I am honored to serve as President of the National League of Cities, representing the Nation's towns and cities throughout our great country.

I am here this morning with my colleague to discuss whether we can achieve a more effective partnership to benefit our mutual constituents. We want to begin by thanking you for convening a session yesterday to start this dialogue so that we can continue to understand where the fundamental changes may occur in regards to our relationship at the Federal, State, and local level. We are grateful to you for your recognition of the importance of this issue, not just to us, but to our citizens and to all Americans.

The changes, both those ongoing and pending, in the Executive Branch, on the Hill, as well as by the regulatory agencies, could have long-term impacts on State and local governments, so we support fundamental changes in policy direction, many of which you have either authored or supported, to ensure more efficient and effective possible services to our citizens and taxpayers.

At the time of our Framers, when we were discussing the issue and the fashion of the Federal system and federalism, it was clearly a long journey through the mud and swamp from the White House to the Capitol. But as we look at Federal policy and the changes, it is a matter of microseconds in regards to information and technology and the borders that we have to deal with as we deal with the relevant system of federalism that exists today.

The most powerful trends affecting our future are international trade, deregulation, and information technology, and this morning, Governor Leavitt has already noted the report looking at the impact of global economy, deregulation, and information technology on the structure of State and local government. Yesterday, we had an opportunity to talk about what are the variables and what are the challenges that we are going to be facing, and clearly, we came up with some ideas that I think were revolutionary and will take some time to dialogue and to come to conclusion on.

For that reason, this morning, we join the Nation's Governors as well as my colleague, Representative Dan Blue, in making clear our commitment to creating a more enduring governmental part-

[1] The prepared statement of Mayor Anthony appears in the Appendix on page 171.

nership. Let me make it clear that we support the Mandates Information Act, the Federal Financial Assistance Improvement Act, the Regulatory Improvement Act, and the Regulatory Right-To-Know Information Act. These are critical steps in this new information age to making a better process available for all decision makers, and we thank you, Mr. Chairman.

These may seem like small steps, but they are critical and crucial to the future of our relationship on all the levels. We hold as our highest priority, not only in our association but amongst our Big 7 organization, a broader effort to redefine our intergovernmental partnership, and for that reason, we are pleased about your leadership on the Government Partnership Act of 1999, along with the crucial and critical assistance over the past few months from Senator Levin, and, of course, I often refer to him as former president of the National League of Cities, Senator Voinovich. This bill marks, we believe, one of the most important efforts to fundamentally rethink the nature and relationship of our Federal system.

Our members overwhelmingly support legislation that requests that we halt the new trend of major preemption of a historical tradition of State and local governments and responsibility as one of, again, our top priorities.

No issue in 1999 is more likely to affect the bottom line of local governments and local government budgets and services than preemption, and the rights of citizens in cities and towns across the Nation than Federal efforts to preempt those historical and traditional municipal authorities. This is an issue city leaders will confront in the Federal courts, the Congress, and the administration, and at independent Federal regulatory agencies.

We believe the recent trend of Supreme Court decisions, the Safe Drinking Water Act, the Unfunded Mandates Reform Act, and the education FLEX legislation, demonstrate the possibilities of a more effective and efficient partnership. We note that at a time when it has become more difficult for the Congress to act on environmental legislation and the issues themselves have become increasingly complex, Congress unintentionally creates a greater role and authority for Federal agencies to set and direct Federal policy.

As we look forward to the issues that will shape the next millennium, we think it is important to secure a system where we have a greater reason to work together. Whether the issue is tax reform or electronic commerce or electric utility deregulation, any Federal action can have enormous consequences on States and local governments.

We are pleased that the model set by this Congress of consultation first, joint efforts to achieve bipartisan consensus, and action which provides for pre-assessment accountability and enforceability is a model for the future. So we recommend a few things.

We recommend that the Committee consider the adoption of the pending set of federalism bills scheduled for markup next week. We recommend the introduction of the Government Partnership Act of 1999 to act as a follow-up to the Unfunded Mandates Reform Act of 1995. And, clearly, we are grateful for the leadership of the Chairman, Senator Voinovich, and other Members of the Committee, and we hope that we go back to the 200 years in Philadelphia where the Framers clearly provided the responsibility of local

government to serve the people, our constituents, and to help you to serve your constituents, as well.

Mr. Chairman, we thank you for this opportunity.

Chairman THOMPSON. Thank you very much.

Sitting here listening to you, it occurs to me that while a lot of people point out that we are living in a more complex society with technology and so forth, the global economy, is pushing us away from federalism and inexorably so, that they overlook the fact that another change that is taking place in this country over the last couple of or 3 decades is the increase in the quality of our government at our State and local levels.

At the State level, for example, we have more and more time devoted by the legislature. Some people do not think that is necessarily a good thing, but most people, when they look at the level of education, the level of time spent, the salaries and things, all of the indications that you might look at in terms of what kind of people you are getting into those areas, it is coming up all the time across the board.

So there is much more capability in every sense of the word at the State and local level than we used to have, so therefore, a better ability to deal with some of these issues. While there are some forces pushing in the other direction, there are some real important forces, I think, still pushing in the direction of recognizing the benefits of federalism.

I appreciate both of your references to what we are doing here in this Committee. We have tried to make a real statement and a real contribution to this. Everybody seems to give lip service to the concept of federalism and the laboratories of democracy and the government that is closest to the people is best and all that, but we are really trying to do something about it.

As you point out, in our next markup, we are going to be considering a regulatory accounting bill, which will indicate, from your standpoint, among many other things, the impact of regulation on State and local government. We will attempt to pull together in one place the extent of regulations and what it is doing with regard to State and local government.

The Regulatory Improvement Act that you have talked about will require more consultation with State and local governments. We would be requiring, in appropriate cases, cost-benefit analyses and risk assessments and things of that nature, not requiring anybody to make their decisions based on that, but at least having the information there, having some peer review, having some open discussion, some transparency, including discussions at an early stage with State and local governments before they are all locked in and there is really nothing you can do about it.

The grants management bill will help with regard to the administration of grants. All these things are coming up next time, and I think they are all a part of a bigger picture and I appreciate your endorsement of those.

Of course, there is the Government Partnership Act, as you mentioned, on the question of preemption. Again, what we are trying to do there is not come down with a heavy hammer and say, you have got to do it this way or the States and local governments always prevail. All you are basically saying is, first, before the Fed-

eral Government makes a determination that we are going to preempt in an area, that we give it some consideration as to the ramifications of what we are doing, and second, to make sure that we intend to do it. We are apparently preempting in areas that perhaps we did not even intend to preempt, thus the doctrine of implied preemption.

So a lot of good things are happening and I think that one of the things we need to do, if we can move forward with the Government Partnership Act, is consider whether or not we should be in some way formally contacting your associations and having some discussions with regard to major changes that we might make in these areas as we do our assessments of the impact and so forth. I do not know how we are going to know that unless we contact you, so I look forward to us working together on those things.

As you look at it, you are looking at it from the State and the local level. Representative Blue, you mentioned that perhaps we are doing more harm than we realize. That intrigued me. Also, you mentioned in your written statement that the Federal Government is not always effectively protecting the public, even in the environmental public health areas. You indicated there might be some abdication there on their part.

Most people kind of look at the Federal Government and say, well, we have got to depend on the Federal Government totally to protect our health and environment. I take it from what you are saying that you do not necessarily subscribe to that totally. Could you elaborate on that a little bit?

Mr. BLUE. I think there are many instances in which State governments, especially, and to a more limited extent, local governments, can intrude into the environmental area. When you start talking about air quality on a large scale and issues like that, clearly, there is a need for Federal involvement.

But when you start talking about more stringent requirements at a State level, you talk about something over and above whatever the minimum requirements are that the Federal Government or a Federal agency may impose, State governments and local governments ought to be free to experiment from that platform, to add things to enhance the quality of life of their respective citizens.

Essentially, when I say ''abdicate'' in my statement, I meant it is not that the Federal Government has not entered into the field and has not legislated to some limited degree in an area. But in many instances, the ability of State and locally-elected officials to deal more seriously with specific problems, I think, is infringed upon sometimes when the Federal Government preempts the area and prohibits or prevents our government from entering in and enhancing whatever it is that you may be trying to achieve at the national level.

Chairman THOMPSON. That was part of the debate, for example, in the Safe Drinking Water Act. The Federal Government was requiring the locals to test for things that did not——

Mr. BLUE. That did not grow anywhere within 2,000 or 3,000 miles, I think. There is something happening in Hawaii and you have to test for it in Oklahoma and Nebraska, or somewhere in the Midwest. It did not make a lot of sense.

Chairman THOMPSON. It shows that we can move off the dime eventually when we are faced with that, and with regard to that, welfare reform, unfunded mandates, Ed-Flex in the education area, and so forth.

From the State area, and you, Mayor, from the local area, just on a daily basis, what are the biggest problems that you face or that you see that are presented by not recognizing sound principles of federalism, areas where you see the Federal Government preempting, that your citizens would be better off if there was not preemption or more flexibility on the State or the local level. Does anything in particular come to mind?

Mr. BLUE. Let me cite one specific for you. Just last week, we were debating in my legislature the issue of health care, and every time that issue comes up, we are confronted with what does ERISA do. Hundreds of court cases over the last several years have basically determined that certain areas in ERISA dealing with health care are off limits to State legislatures. We cannot do anything about it.

Now, I do not know that there is any specific, at least as I recall, specific prohibitions in the actual Act that say that we are totally preempting the field——

Chairman THOMPSON. I think you are.

Senator EDWARDS. Especially in ERISA.

Chairman THOMPSON. Yes.

Mr. BLUE. But I am talking about when we start talking about HMOs that are not dealing with major employers and you have got an ERISA plan. But every time you start a debate on health care, you run into at least what is perceived as some preemptive effort on the part of the Federal Government or Federal agencies.

One of the things, I think, that Governor Thompson may have mentioned, the TANF grant, from an NCSL perspective, we are not as bothered by the regulations, because, quite frankly, our staffs were in constant consultation on developing the regulations. I know NCSL staff was, because I was consulted off and on. The principles may not have been to the degree that we should have been across the country, but from a staff standpoint, I think we probably won 90 percent of the battles that we engaged in on the TANF regulations themselves.

But I think that it underscores a bigger point, and that is, as long as we know that before a decision is made, that we are consulted and we are at the table when the discussions are going on, it highlights what the difficulties are and it highlights where you are infringing on what we perceive to be State territory or local territory.

Chairman THOMPSON. That is one of the things we are trying to address in the Unfunded Mandates Act and one of the things we are trying to address in the Regulatory Improvement Act.

Mr. BLUE. Absolutely.

Chairman THOMPSON. It is early consultation.

Mr. BLUE. Sure.

Chairman THOMPSON. Mayor Anthony.

Mayor ANTHONY. The areas that I think local government tends to be affected by, and it probably transcends a lot of areas, because we not only have to deal with the Federal regulations but we often-

times find ourselves being challenged by the State regulations. So we are, for lack of a better term, dumped on a couple of times as stuff rolls down in the process.

Clearly, in the environmental area, it has always been a challenge that we are required to implement policies from the Federal and State level without funds being given to us. I think that is working a little bit better in some States, in some counties, but that continues to be an area.

When it comes to things such as construction and trying to provide the municipal financing, there are stringent requirements that are not only placed on local governments by the SEC but the IRS and the process that we have to go through is oftentimes very cumbersome.

I have often said that good policy for local governments that is created by the Federal Government and the State Governments are good policies when money is attached to it. Oftentimes, we are seeing issues such as the ADA, which I think is good policy, but there are a lot of requirements on the State and local government to abide by this legislation but no process or mechanism to provide us the resources to implement. So, yes, great policy, but it is not great policy when there is money not attached to it.

As, Mr. Chairman, you have noted by your chart, the revenue that has increased for the Federal Government has not continued to increase at the same level as that of the local level. The differences really become more obvious when you take a State-by-State or government-by-government parallel with this chart. The Federal Government continues to grow at this point. State revenue grows here, and the local county and city revenues have not grown. They have basically decreased as it relates to your taxes collected.

Chairman THOMPSON. So that red line there is basically State growth more than local growth, is that right?

Mayor ANTHONY. It combines both and it makes the percentages look good in terms of the State and local, but if you pulled the local level out, as you will see when you get a chance to review this chart, we have the State revenue of California that has grown—Federal is at about 22 percent. The State of California is about 5 percent, and Santa Clara County City has decreased 5 percent.

Chairman THOMPSON. What are you referring to there?

Mayor ANTHONY. That is the pamphlet, the executive summary of the global——

Chairman THOMPSON. That is a part of our record, is it not?

Mayor ANTHONY. Yes, it is a part of your record.

Chairman THOMPSON. OK.

Mayor ANTHONY. So your chart, as amplified, is very correct and on point, but it is amplified by just the State level.

Chairman THOMPSON. That is a very good point. Thank you very much. Senator Voinovich.

Senator VOINOVICH. I have had a lot of opportunity to talk with Mayor Anthony about our mutual concerns. As I mentioned to Governor Leavitt, I think that if the National Conference of State Legislatures and the National League of Cities could give some really good examples of where preemption has hurt and preemption that is being contemplated now will hurt, I think it would give a lot more impetus to passage of Senator Thompson's legislation. I think

that many members of the Senate just are not familiar with the problem. I think the more you can do that, the better off we will be.

The anecdotal thing on the Safe Drinking Water was the fact that we had communities testing, adding 25 new things every 3 years whether they needed to be tested for or not, so that you could not concentrate your money on the things that really mattered. Some of those kinds of anecdotal things are very helpful to members of the Senate and it is important that you communicate those to your respective Senators or get your members to so they understand there is a problem out there that needs to be addressed.

This is kind of off the subject, but it sure does deal with federalism, and that is the TANF program. That program has been very successful. On the other hand, you know that in many States, the surpluses are building up and there are many people in Congress today that are looking at that with some interest in maybe taking some of the money. I would be interested in your response.

Mr. BLUE. Certainly, our response would be to urge you not to take it, because we think that as part of legislation several years ago, when we agreed to accept less to do more with it in exchange for the flexibility, and besides that, I want to point out that in North Carolina, we had gotten waivers before the new legislation and had had a jump start on trying to reduce the welfare rolls and I think that we have been very successful.

I listened to Governor Thompson's numbers. We have not gotten 91 percent of the people off, but we have been extremely successful, and I think that to come in and reduce the amount now when we are getting to the most hard core of those on the welfare rolls would be a little unfair to the States that have really put forth the effort, the local governments that have maintained their effort as best they could, and we ought to have the ability to try to go ahead and totally correct the problem.

But let me address one other issue that you raised, because we will have our staff pull together all of the instances where we think that preemptive efforts or lack of respect for federalism adversely affects State and local governments, but I want to underscore again the point that Governor Leavitt was making about what impact e-commerce is going to have on the ability of State and local governments to remain viable partners, especially State Governments, in this State-Federal partnership. It perhaps poses the biggest threat to our ability to generate the revenues to come up with innovative solutions to problem solving of anything that we have seen in our recent history and it very well may redefine the whole relationship between States and the Federal Government.

When we look closely at the numbers, we certainly know that in basically putting a stand-still order in place, saying that we are going to study what the impacts are, Congress did not mean to tie the hands of State legislatures, or for that matter, local governments, because indirectly, they are impacted by their inability to collect property taxes as shopping centers start feeling the real pinch of e-commerce.

But I would suggest that preemption in that area alone, by saying that the State Government cannot do what State Governments normally would do or local governments regarding a stream of rev-

enue is something that was not intended, something that entered into the debate further on in the discussions, but something that was not intended by enactment of legislation. Without moving urgently and, I think, very quickly on that, the size of e-commerce will be so great that it will be very difficult to really protect States' interest in a stream of revenue that States absolutely have to have, since we are so dependent on sales tax revenue to finance the services of State Government.

So when you talk about specific examples of preemption without a specific statement at least early on in the discussions as to an intent to do that, I think that is right now the most vivid one.

Senator VOINOVICH. I really do not think that members of Congress understand the full impact that that is going to have on our sales tax revenues in our respective States and how important that source of revenue is to being able to provide basic services, and particularly in the area of education. One of the things that is puzzling to me is why we do not have more lobbying being done by the National Education Association and the American Federation of Teachers on this issue.

I think that, again, you need to really dramatize this issue and its threat to the basic source of revenue that so many States have in order to provide services for people. Congress should understand, if it evaporates, then the pressures are going to be on Congress to come up with some other source of revenue to take care of that, and that means that they are going to have to get into the issue of some other taxation to compensate for the loss of revenue that you have.

I think when people finally understand that, they may take a lot more interest in trying to work out some fair solution to State and local government and also to make sure that this is not an encroachment on electronic commerce in this country or even internationally. But it is a major threat to federalism because if you do not have the money to take care of the problems, then you are in bad shape.

Chairman THOMPSON. That is really hitting home in my State right now. We are projecting shortfalls in the future. There is a lot of discussion going on as to what we should do about it in terms of our tax structure and so forth. But one of the things that has got to be figured into that is to what extent the Federal Government is preempting sources of revenue and to what extent they are causing the expenditures of revenue which could go to solve our problem. I can assure you, that is one of the things that I am going to be looking at.

Mayor Anthony, did you have a comment on that?

Mayor ANTHONY. I was just going to follow up on the basic service issue. It clearly does impact especially States like Florida which relies a lot on the sales tax in order to carry out services, and it will impact the teachers and services, police, fire, and basic services.

I agree with Senator Voinovich—we have not been able to bring the partners to the table the way that we need to to get this issue out and available to people to understand. I am one that uses the e-commerce to be able to order my books and my wife uses it for books and other things, so it is a challenge when I say to her, you

know, we are not providing taxes to be able to help local government. She says, oh, so I am not paying taxes if I order on e-commerce. So that is the reaction.

We have to be able to find a new method of engaging other associations on this issue or we are going to see a continued loss, in not just Tennessee but States throughout this Nation. So we are partnering. The Big 7 has a campaign that we are trying to engage others in this dialogue.

In regards to the issue on welfare reform and the process, I agree with Representative Blue. We are just beginning to see the successes in the States and counties. But I do want to share with you that this is the time now, since the economy is good and unemployment is low, that we deal with a population that we have not dealt with truly, and that is those that truly are impoverished. It is easy in a sense to look at the numbers, but if we looked at the numbers in regards to the unemployment of those that are in the inner cities and minorities, African Americans and Hispanics, those numbers continue to be high. So as we celebrate, we need not celebrate totally until we are able to get those rural communities and those pockets of people who have not participated in the prosperity of America like most have.

That is the real challenge. So I do not want our arms to be tied at this point by more preemption and more regulation and less flexibility. This is truly the time that we can test ourselves to see if we really are bringing prosperity to all Americans as we approach the year 2000.

Chairman THOMPSON. Thank you very much.

Senator Edwards.

OPENING STATEMENT OF SENATOR EDWARDS

Senator EDWARDS. Thank you, Mr. Chairman. I might add that I share many of the beliefs that you and former governor and Senator Voinovich have expressed this morning. I do not know why it is that we believe here inside the beltway in Washington that we are so much smarter than the State legislatures back home and the local governments. My experience has been that these folks are thoughtful, they are on the ground, they know what is happening, and they make good decisions about what needs to be done.

Let me also add that I wanted to come here because Dan Blue is here, an old friend of mine, a colleague. You all have been referring to him as Representative Blue. He was the Speaker of our House, and so those of us who know him better refer to him as Speaker Blue, one of the best Speakers we ever had in the history of the North Carolina legislature. He is an old friend and colleague and someone who commands tremendous respect in the leadership community in North Carolina, so we welcome you.

Mr. BLUE. Thank you.

Senator EDWARDS. Let me ask a couple of specific questions, and I will start with you, Speaker Blue. We have talked a little bit about this issue of preemption and your concern about preemption, and I fully share that concern. Can you give us some specific examples, and I am particularly interested in North Carolina, where preemption has created a real problem, for example, in the area of education. You mentioned health care, for example. I know right

now the North Carolina legislature is engaged in discussion of a patient's bill of rights and HMOs and those sorts of things, and ERISA is obviously a real impediment to the efforts in that area. But, for example, any ideas about things you have encountered in the area of education?

Mr. BLUE. Nothing specifically comes to mind, except there are a lot of regulations regarding different classifications of students in public education. We have had some debates about that. I will not say that we are preempted. It is just the regulatory requirements that we run into and spending money the ways that we think may be more effective to address certain student populations.

I will give you another area perhaps where preemption has bothered us, or at least we think it has. In the area of transportation, there has been a lot of debate. There was some debate about drivers' licenses requiring Social Security numbers and issues like that that directly conflicted with North Carolina law, and we thought without any valid reason, privacy issues and things like that where we have made a specific public policy finding that we wanted to preserve certain aspects of privacy. You get Federal law preempting without any clear indication on the part of the Congress that you want us totally preempted in that field. It is things like that that we get the midnight phone calls on, and a wide range of issues.

I think, again, to answer your question directly, it would be much easier if I just list all of the various things, and we will get that to you this afternoon as they come to mind. I will call my staff at home and get the specific instances. I was looking at the broad effects and the cumulative effect of preemption in sort of a vacuum, somewhat, without looking at the specifics, but I will get that information for you.

Senator EDWARDS. I think that Ed-Flex, for example, which was mentioned by the Chairman, was a good step in the right direction, but it is just one step that needs to be taken. There are many steps that need to be taken to remove some of these bureaucratic strings that are tied to Federal money that goes to State and local governments so that you all can use this money more efficiently. I mean, you are there. You are living there. You know what is happening.

Mr. Anthony, can you respond to that question, too, some specific areas that you have seen?

Mayor ANTHONY. Senator, first, I was going to ask you, would you like to be a mayor, because you sound as if you would make a great local government official.

Senator EDWARDS. I have to see if I like this job, first.

Mayor ANTHONY. As Representative Blue has already noted, there have been strings in the educational area in regards to stringent requirements, and you can go into the construction of schools, you can go and get examples in regards to specific curriculums that are required.

But can I give you a great example? There are States all over this Nation that are taking charge and making sure that the flexibility that is there, they are utilizing it. For example, if we look in the education area, there are State legislators and governors all over this Nation that are having special sessions funding education because that is an important priority to their State. Other States

are having special sessions on environmental policy because that is a specific interest in that State. Counties and cities are having special revenue directed for sensitive lands. In Palm Beach County, where I am from, we created a taxing authority for children's issues, children's services taxes.

These are examples to show that if we have the flexibility and if we are not preempted by the requirements of the Federal Government, we deal with our issues based upon the concerns and the desires of the people that live in those communities, and I think that that is the real model that we would like to be able to share Nationwide and that Congress understands.

Cities, States, and counties in this Nation are not usurping their responsibility. In fact, if we are concerned about education in our State, if you are not preempting us and giving us all of the additional requirements, we will have a special session and we will put money into education if that is our State priority. But we would like that flexibility, and some cities around this Nation are buying sensitive properties through a general obligation bond of the citizens of that community because that is their interest.

So there are some examples and models throughout this Nation that I hope we keep in mind through this process that are working. As you said, Mr. Chairman, government officials all over this Nation are prepared to provide the services, Senator, that our citizens want.

Senator EDWARDS. The word that comes to mind is a word I have heard the Speaker use on occasion, is empowerment. It seems to me that we want less of our Federal tax dollars spent on this bureaucracy up here in Washington and more of it spent to empower State and local governments to do the kind of job they need to do and are well-equipped to do, in my judgment. Do you agree with that, Speaker Blue?

Mr. BLUE. I agree with that, Senator. And the other thing, when we look at the wide range of issues, it is further empowerment, but also allowing us to use a power that at least historically we have had or perceived that we have.

If you just look at the areas where preemption gets to be a hot topic, at least in NCSL corridors, it is tort reform, areas that traditionally have been the domain or bailiwick of the States. Right now, we have serious discussions on what kind of preemption there will be to insulate various entities from Y2K potential tort liability. Those are issues that States are best suited to deal with. Those are issues that, historically, States have been empowered to deal with.

To have the Federal Government intrude in that area, whether it is commerce or other areas, and preempt us out of the fields, we think does not serve the purposes of the Federal system that we are a part of. And you can go down the list, of product liability and a wide range of different issues where there has been serious discussion of preempting State authority to act in ways the States are best suited to act.

Senator EDWARDS. I could not agree with you more. All I have to say, I have ultimate confidence in State and local governments' abilities to act in those areas and to act intelligently and thoughtfully and with respect to their specific local concerns, which is what I think we ought to all be thinking about.

Let me just say, Mr. Chairman, thank you very much. I want to say thank you to Speaker Blue. Mr. Anthony, thank you for being here. It is always an honor for me to be in the presence of our Speaker.

Mr. BLUE. Thank you.

Chairman THOMPSON. Thank you very much. Senator Lieberman.

Senator LIEBERMAN. Very briefly. I am sorry, gentlemen, I had to be in and out. I thank you for your testimony and your interest and your leadership generally.

I was actively involved in the activities here that led to the moratorium on taxation regarding Internet sales, and part of the reason for the moratorium was the complication of the issue. I do not know whether you have any thoughts today about it, but we are taking some tried and true federalism principles that have been applied to interstate commerce, but we are applying them to this extraordinary new highway, as they say.

The question that puzzled a lot of us, because we see this trend developing—more and more sales going on e-commerce and, therefore, more and more revenue being deprived to the State and local governments from sales tax—but whom do we tax and how do we do it? Does the sale occur in the place where the person is sitting in front of their PC? Does it occur in the State where the headquarters of the seller is? Does it occur maybe in some third State where they have their warehouse from which they dispatch? Does it occur, as some have alleged, where the Internet service provider happens to be located, where all the connections are happening?

It is really serious, and again, having come from State Government myself in a State that has been primarily dependent on the sales tax for its revenue, this has real serious implications. But the question is how to make it rational and fair and not deprive the States not only of the revenue, but, as you have said, of the independence that comes, of the strength that comes with an independent source of revenue. Do you have any thoughts about that this morning?

Mr. BLUE. I have a few. First, I agree with you that there are some very serious questions raised in e-commerce. You get the situs question, certainly, and it is as compelling as any.

Senator LIEBERMAN. Right.

Mr. BLUE. I think that this may be the kind of situation that does not question the States' rights to a revenue stream but raises a challenge for the States and localities in partnership with the Federal Government and the Congress to come up with some solution by defining those issues and still collecting the revenue. It may cause us to create different kinds of mechanisms for doing what all 50 States are uniquely qualified to do. Every State—well, not all 50, I think there may be four or five States without a sales tax, but that is the one strength of State tax officers and revenue collectors around the country. They are experts in collecting sales taxes.

Senator LIEBERMAN. Right.

Mr. BLUE. We distribute them back to the local government.

But it may call for some kind of partnership developed at the national level so that you cannot skip from State to State or deciding the question that we ran into. Congress can deal with that because of its commerce powers while we can at the State level and you can

determine how to aid us in doing what we have to do in order to deliver the services to our people.

I do not at all question the need for a serious study. The moratorium may have been appropriate. I just would say that if, in fact, it is going to take us a long time to do something about it, the forces build up so quickly that after we have decided what to do, it may be a little more difficult to do it when you are dealing with a $100 billion stream of commerce as opposed to a $5 billion stream of commerce.

So we think there is some urgency about it. We know that the Committee that was appointed to look at it has not met. We know about the challenges of its composition. But something has to be done. We have appointed a committee within the National Conference of State Legislatures to study all of the aspects of e-commerce and, hopefully, come up with some suggestions, and recommendations, that we can share with you here in Congress.

Senator LIEBERMAN. That is a fair point. Interestingly, your answer reminds me that in all the discussion we had leading up to that bill, nobody was talking about, or wanting, the Federal Government to become the tax collector. It was really more a question of how you rationalize the claims that competing State and local jurisdictions might have to tax this new form of commerce. Even if anybody thought about it conceptually, it was as a way to collect the taxes to then return them to the State and local governments, but I do not think there is much interest here in having the Federal Government develop the capacity or the whole bureaucracy required to begin to collect sales taxes, essentially.

Mr. BLUE. What we are concerned about, Senator Lieberman, is that we do not experience what so many of us went through in the late 1980's or early 1990's by coming up with a way to tax or to get the revenue from this source that we get from any other sale and 60 days later it has changed its situs. In the 1980's, those of us at the State level addressed the use of incentives that States were giving to lure companies from one State to the other, and we know that with e-commerce, it is easy—in fact, you can move it instantaneously.

So from the Federal level, we need some ability to ensure that it does not jump across the North Carolina mountains over into Tennessee and you constantly are chasing an object that you cannot catch.

I know that there is serious discussion on us guaranteeing that the VAT tax will be collected for the European Community, and so there may be some other ways that we can look at what we do for States within this structure to collect sales tax on e-commerce. But I am saying that it is the kind of thing that is challenging, but certainly we ought to be able to rise to the instance.

Senator LIEBERMAN. To deal with it. Mayor, do you want to add anything?

Mayor ANTHONY. I agree with Representative Blue. Clearly, as local governments, we think that the State level is where it is happening in regards to the revenue collection. The National League of Cities has been discussing and debating this process for the last 2 years in preparation for this commission. We do agree that more research is needed, but the arguments that have been made to cre-

ate confusion, in a sense, of saying that we have 50 different States and 50 different collection processes is one that I think goes back to the concept that we do not think that State and local governments are able to manage and create policy for their own constituents and their own future, and, in fact, we are. We are prepared to deal with this.

I personally think that the State in which the recipient receives the product is where the tax is collected. The report may not, in fact, come back and say that. It may be greater minds than mine, because I am a little country boy from South Bay, Florida, but——

Senator LIEBERMAN. Yes. The Chairman tries to pull that line on me every now and then. [Laughter.]

Mayor ANTHONY. But I think that that is the answer there. But, again, we can go through a process of research to come up with one that I think is appealing to the partnership that we have created through the Big 7 to resolve this issue.

Senator LIEBERMAN. Good. I look forward to working with both of you and your organizations on it. Thanks very much.

Chairman THOMPSON. One of the things in listening to that that I am reminded of is the conflicts of law question. I never could figure it out in law school, but it is there. Each State has its own rules as to the conflicts of law that it will apply. You think about the law of contract. Some States apply where the contract was executed, some where it was consummated, some where it was performed. Some recognize that if you put in the contract that this is the State law that will apply.

So the point is that States are used to dealing with rather complex situations. There are accusations sometimes of forum shopping and things of that nature that would be under any kind of a system. But we have a rather, for, I guess, at least 150 years or so, a rather complex set of 50 different sets of rules as to how they apply, conflicts of law situations that involve transactions across State lines with regard to very complex commercial transactions. We are not flying blind here. It is nothing that we cannot do.

Thank you very much, gentlemen. You have been extremely helpful and we really appreciate you being here. We look forward to working with you in the future.

Mr. BLUE. Thank you.

Mayor ANTHONY. Thank you very much.

Chairman THOMPSON. Thank you very much.

I would like to introduce our third and final panel. Professor John McGinnis is joining us from Cardozo Law School. He will be followed by Dr. William Galston, Director of the Institute for Philosophy and Public Policy.

Gentlemen, thank you very much for being with us here today and for waiting through this long morning, but we certainly want to hear from you. Professor McGinnis, would you like to start?

TESTIMONY OF JOHN O. McGINNIS,[1] PROFESSOR OF LAW, BENJAMIN N. CARDOZO LAW SCHOOL, YESHIVA UNIVERSITY

Mr. MCGINNIS. Thank you very much, Mr. Chairman. I would like to make my full statement a part of the record. I am very

[1] The prepared statement of Mr. McGinnis appears in the Appendix on page 180.

grateful to be here today to talk about constitutional federalism, which is the cornerstone of our government. I would like briefly to talk about the virtues of constitutional federalism and then about how to revive it.

Chairman THOMPSON. Your full statements will be made a part of the record, to whatever extent you want to summarize.

Mr. MCGINNIS. Constitutional federalism is the most important structure of our Federal Government. It is a happy paradox that two interlocking governments can lead to better governance but less governance than one unitary State. The way the Constitution does that is to create two sets of governments, each limiting the other.

The Federal Government was limited by the enumerated powers. Essentially, the Federal Government domestically was given the power to create a national free market. But that very power limited the State Governments, because the State Governments had to compete in that market. Therefore, any exactions they took from their citizens would tend to cause their citizens to move, or move their capital elsewhere, and so that was a limitation on State governments.

But federalism also made governance better. It made governance better because it created a marketplace for governments. States had to compete, to create public goods, the public services that the market and the family cannot provide. There was pressure on them because they were in this national marketplace, this competitive marketplace among themselves to produce better services at lower costs.

Finally, the other most important virtue of federalism was that it pushed decisions down to the people. Adam Smith, in fact, said that benevolence is much more likely when people live among one another, and social solidarity and civic responsibility comes most easily in our communities. That is the other reason that federalism is part of a greater principle of subsidiarily, of trying to push decisions down to the people in the smallest possible community.

These are very great virtues. Unfortunately, our federalist system in the last 60 years has been very much frayed. In my testimony, I go into the reasons for that, but suffice it to say that we really no longer have a doctrine of enumerated powers. The Federal Government has plenary spending, and regulatory authority, and in my view, the consequences have been extremely unfortunate.

The Chairman has put up, I think, a very useful graph, because one of the most important consequences is that both our State Governments and our Federal Government tax and spend less efficiently than they did when federalism was at the height. I will just give you one statistic to show that. When federalism was at the height, which, I think, was around 1910, before the Sixteenth and Seventeenth Amendments, the Federal Government spent around 1 percent of GNP domestically on programs. Today, it spends 17 percent.

But it is not only the effects on our economy that are troubling. To me, the most worrying aspect of federalism's decline is the effect it has on our civic life. Because most government happens far away, apart from citizens' communities, citizens feel more alienated and distant from government.

And finally, because the Federal Government now has plenary spending and regulatory authorities, there are really no clear demarcations between the State and the Federal Government and that leads to a serious problem in accountability. If both governments can do the same thing, Federal officials can avoid accountability by seeming to make a State official be responsible for the action the Federal Government has undertaken.

So what I think we need today to do is to think about how to revive constitutional federalism, to do what Governor Leavitt said, create a new system of enforceable federalism. I am very pleased to support the draft bill of the Chairman of this Committee, which, I think, goes straight to the issue of accountability, the third danger to which the decline of federalism has led us.

The problem of preemption today is that the State laws can be preempted without the Congress making a conscious decision to do that, and that is a serious problem. Happily, the Chairman's bill would require Congress to provide reasons in a legislative report for its decision to preempt State law and the bill would also declare that no legislation or regulation would preempt State law unless it expressly so stated or it was in direct conflict.

This bill would encourage deliberation before preemption. It would also make it impossible for Federal judges to make decisions about preempting State law without express congressional authorization, and that is very important, because one of the protections the States still have in our system is that representatives are elected from the States and it is important that they make the decisions clearly and expressly to preempt State law.

But I must confess that I think this bill in itself is not sufficient to restore constitutional federalism. Unless the Federal Government is constrained constitutionally from spending and regulating, interest groups will bypass States and obtain spending and regulation on their behalf from the Federal Government. One-stop shopping is not only easier, but it avoids the competitive pressures that inhibit States from adopting special interest legislation.

Therefore, I would actually like to suggest that many of the other kinds of framework legislation and constitutional amendments that this body is considering to constrain the Federal Government are actually very important pieces of federalist legislation. I would point to the balanced budget amendment in this regard and the amendment which the House of Representatives has recently voted on, and voted with a majority, not the necessary two-third majority, to require a supermajority to raise taxes.

An amendment that would restrict both debt and taxes would force individuals and interest groups back to their States. There would be, then, constraints on the ease with which the Federal Government could spend, and the advantage of that would be the Federal Government would again be a limited government and there would be restraints on that graph showing us the taxes that have gone up so far in the past 80 years. And States and localities would become once again the main repository of spending, and competition among them would be revived.

Similarly, I think that one should also consider framework legislation and, if necessary, a constitutional amendment to make it very much harder for the Federal Government to devolve regu-

latory decisions on Federal agencies. If Congress itself has to make the decisions on regulations, the Federal Government can regulate substantially less. And once again, I think that would reinvigorate States, because everyone would look primarily to them for regulatory activity. We need to think of how to reinvigorate States constitutionally.

I would add that none of these proposals would get rid of the Federal Government. The Federal Government could still operate to raise taxes, to raise debt, to spend more money, when there was a substantial national consensus. That is what a super-majority rule would require. They could still regulate if they were willing to take the hard work of making the regulations themselves rather than simply delegate these responsibilities to the State agencies.

But these two kinds of reforms would once again reinvigorate federalism and bring the States back to their proper place in our Federal system. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Professor Galston.

TESTIMONY OF WILLIAM A. GALSTON,[1] PROFESSOR, SCHOOL OF PUBLIC AFFAIRS, UNIVERSITY OF MARYLAND AT COLLEGE PARK

Mr. GALSTON. Mr. Chairman, my name is William Galston. I am a professor at the University of Maryland's School of Public Affairs. I must say, it is an honor for a private citizen representing no one except himself to be invited to testify on a matter of such fundamental importance to our Nation.

As you know so well, federalism is not a new question for our country. Indeed, it is the oldest question. It is the first question our founders faced in framing our Constitution and then in defending it against its many adversaries.

Confronted with the manifest inadequacies of the Articles of Confederation, the founders set out to strengthen the power and authority of the central government. They did so for three reasons that have shaped our history, and in my judgment, remain relevant today. First, to enable the American people to promote the common defense and general welfare of the Nation as a whole, as distinct from its parts. Second, to build a continental market free of internal barriers to the flow of commerce. And third, as James Madison emphasized in *Federalist No. 10,* to defend the rights and interests of individuals and minorities against the potential injustice of local majorities.

Not surprisingly, the Framers' efforts encountered staunch resistance from State officials who feared the loss of prerogatives and power if the new Constitution were ratified. In response, the supporters of the Constitution formulated a theory of federalism, memorably articulated in the Federalist Papers. In the interest of time, let me very briefly summarize the key points.

First, the system established by the new Constitution is neither a pure federation nor a pure centralized national government, but rather an historically unprecedented composite in which there would be concurrent jurisdiction over many matters, as well as

[1] The prepared statement of Mr. Galston appears in the Appendix on page 195.

some exclusively reserved to the States or to the Federal Government.

Second, the Constitution invites and guarantees an ongoing tension between the States and the Federal Government, a tension that, like the struggle among the branches of the Federal Government itself, helps secure the people's liberties.

Third, in this ongoing struggle, the States will endeavor to expand their powers at the expense of the union, as will the National Government at the expense of the States.

Fourth, neither party to the struggle enjoys superior wisdom, virtue, or legitimacy. Both are trustees of the people, constituted with different powers to pursue different public purposes, ultimately answerable to the people alone.

There is no question that, in practice, Federal power has grown substantially over the past 2 centuries. It is important to understand why. This growth stems in part from classic Supreme Court decisions early in our history by Chief Justice Marshall that established broad, rather than narrow, interpretations of the necessary and proper Commerce and Supremacy Clauses. Federal authority was further expanded by the Civil War, which led to constitutional guarantees for the privileges and immunities of national citizenship, created for the first time in the wake of the Civil War.

Growth of Federal Government also reflects key 20th Century developments, such as the rise of an advanced interdependent industrial economy, a national economic emergency that overwhelmed the capacity of States and localities, a series of global military and security challenges, the struggle to secure in practice the rights of equal citizenship guaranteed to all Americans in theory, and the emergence of new challenges, such as environmental protection, that could not be fully addressed by States and localities acting individually.

These considerations remain relevant today, in my judgment, and argue for continued vigorous Federal power in the 21st Century. Nevertheless, it is clear that Federal authority is not and should not be unlimited. As James Madison says in *Federalist 39*, under the Constitution, the States retain "a residuary and inviolable sovereignty."

Courts have argued and will no doubt continue to argue about the precise extent of the matters reserved to the States, but the general proposition that the Framers intended a constitutional system with dual sovereignty is not open to serious doubt, and I would add, Mr. Chairman, that in the past decade the Supreme Court, in a series of cases, has endeavored to restore a brighter line between Federal and State authority, particularly in cases concerning the Commerce Clause.

It is equally clear from a constitutional as well as practical standpoint that States and localities should play a key role in formulating and implementing public policy, and in my prepared written testimony, I list a number of reasons why.

Roughly speaking, the half century after World War II has been divided into two fundamentally different eras. In the first of these eras, for reasons stemming largely from the civil rights struggle, the States were seen as the problem and the Federal Government took the lead. The second era turned this assumption on its head.

The Federal Government was labeled the problem and devolution the solution. In my judgment, each of these assumptions represented, at best, a partial truth.

It is only recently that our governing institutions have begun to create a new synthesis, a contemporary federalism that balances distinctive Federal and State capacities and is responsive to our changing circumstances. Key examples of this progress include the Unfunded Mandates Reform Act, welfare and Medicaid reform, and the new children's health insurance program. All of these were enacted with substantial bipartisan support in the Congress and could not have succeeded without cooperation between Congress and the Executive Branch.

The challenge now is to maintain the progress towards this new synthesis, what Governor Leavitt earlier this morning called the golden mean. To this end and in conclusion, Mr. Chairman, I would urge the following points.

First, in many areas, it will prove productive to form a new form of Federal-State partnership in which the National Government establishes general public purposes and provides resources which the States decide for themselves within very broad guidelines how to employ.

Second, the National Government cannot retreat from its obligation to protect the rights of individual citizens, whether these rights are established by the Constitution or by legislation. The discharge of this obligation will not always, sadly, be consistent with the preferences of other actors in the Federal system.

Third, given the continuing importance of guaranteeing a free and open national market, we must be open to the possibility that economic, technological, and social changes will require the reconsideration of long-established Federal-State relations in particular sectors. Telecommunications, the Internet, banking, health care, and education are examples of areas where such rethinking may well be in order.

Fourth, it is likely that not all changes in the Federal system will point in the same direction. In some cases, the roles of States and localities will be significantly enhanced, while in others, the Federal Government may be called upon to exercise new leadership. A uniform approach is unlikely to promote the public good in every instance. Not every assertion of Federal power is justified, but not every restriction of State and local authority is unjustified. I would, therefore, recommend caution in the face of any proposal that represents a generalized presumption either for or against any particular level of the Federal system.

Thank you for giving me this opportunity, and, of course, I will be happy to respond to any questions.

Chairman THOMPSON. Thank you very much.

Gentlemen, I really appreciate you being with us. We are dealing with fundamentals here, constitutional law, the fundamentals that form the basis of our constitutional law, and we are dealing with the question, essentially, of power, are we not? It is part of our system of checks and balances, our system of federalism, and who is going to exercise the power of government and the kind of balance we strike and so forth.

I think that, as always, the philosophical basis on which we proceed with these bills and so forth is very important. We need to think that through. What is it we are trying to do? What direction should we be going in, being mindful of the fact that we are not going to, certainly by legislation, cure all the problems or set things right in and of itself. I think it is a question of which direction we go in. Where are we and what direction do we need to go in?

It certainly does seem like the trend has been in a particular direction. There have been fits and starts, but when we look at the areas in which we have had devolution, really, it has to do with giving States a little more authority to implement Federal policy, essentially, is what we are talking about. We celebrate it and I am delighted for it, but that is kind of what we are talking about. I think even the court decisions, like in the *Lopez* case, for example, the school guns case, well, we solved that by one sentence, I guess, in the next bill that says it does affect interstate commerce, or something like that.

It seems pretty clear that the trend and the direction is pretty much one way and by legislation we are trying to, in some way say, "Wait a minute, let us think about it a little more before we go any further."

I guess my first question is whether or not because of reasons that people give, such as the technological revolution, such as the global economy, such as the industrial marketplace that we have now, whether or not this is a natural and inexorable force. Does all of that militate toward moving away from traditional concepts of federalism? I mean, is this something that is natural and to be expected? If it is, is it inherently bad?

I take it, Professor McGinnis, you think that perhaps it is not necessarily inevitable, that these things perhaps do not necessarily lead one to conclude we should move away from federalism, and that you would think that if we did that, that would not be a good result. Am I characterizing your position correctly?

Mr. MCGINNIS. Yes. I think that is absolutely right, because I think federalism depends on issues about human nature that are unchangeable. Federalism was a way of trying to limit government, and limiting government is a problem of human nature, as I suggest in my testimony. The problem is, we need to have a government that protects our liberties and our property, but a government that is powerful enough to do that can also threaten our liberty and property.

Chairman THOMPSON. The fundamental debate that kicked our government off had to do with different views of human nature, did it not?

Mr. MCGINNIS. That is correct.

Chairman THOMPSON. Can it go back as far as *Burke* and *Rousseau*, perhaps, in terms of——

Mr. MCGINNIS. Well, I think it does. It goes back, really—I think much of our debate in this country still goes back to *Rousseau* on one hand and to the Framers on the other hand.

Chairman THOMPSON. And how our forefathers viewed the French revolution and all that, the nature of man.

Mr. MCGINNIS. I think that is right, and our Framers and people like John Adams were very skeptical that you could ever believe in

the complete beneficence of government. That is why having a structure in which the governments somehow compete with one another is so crucial, I think, to good government and to limited government. I do not think changes in our technology really transform that fundamental issue.

Maybe we have to change the way we deal with things in certain incremental ways, but it does not change the problem fundamentally, because after all, government is still about ultimately the exercise of force, either through enforcing contracts usually, through the police or through the military. And given that it is the exercise of force of some set of individuals over another set of individuals, we have to think about restraining government and new technology really does not change that.

I would say that it is harder to protect federalism today for one reason. I think people have less of an attachment to their States than they did in 1787. General Robert E. Lee said, "I will fight for my country," his country meaning Virginia, in the Civil War. That is inconceivable to us today because of changes in transportation, in communication. But that may mean, actually, we may need to make our governmental structures more protective, not less protective of federalism, because federalism is so important to preserve this principle of subsidiarily to protect against the ambition of human nature that is unchangeable.

Chairman THOMPSON. Plus the fact that the cost of being wrong at the Federal level has gone up, has it not, in terms of reaching for solutions to some of these problems. If you decide what that solution is and you impose it on the 50 States, there is a greater consequence to that than if each State was trying to come to its own conclusion on these things.

Professor Galston, you suggest that we approach these things with no presumption either in favor of federalism or against it. We all pay lip service to federalism as an inherently good thing. What I take it you are saying is that depends basically on the circumstances. Clearly, each level of government has its proper role. Clearly, they are interrelated and interdependent, to a certain extent, and you have to look at the given situation as to whether or not this particular policy is wise.

So does that not leave us with any ability to set a criterion as to what we follow? Should we have a standard when these issues arise as to fundamental principles, as Professor McGinnis suggests there are still present, on which we can bounce these various issues that we are always facing off of? Do you feel that there can be or should be some kind of objective standard that we apply in each of these cases?

Mr. GALSTON. I think that there should be operating presumptions that are appropriate to different policies. So, for example, in the area of education, there is a history in this country which is backed, I think, by our constitutional tradition, as well, that creates a presumption in favors of States and localities and against the Federal Government. That presumption can sometimes be rebutted for cause, but it is clear where the burden of proof lies.

Chairman THOMPSON. Why is that? Is that not rooted in the Constitution itself? Of course, that specific point is not dealt with in the Constitution, but traditionally, it has been assumed that this

is a State and local matter based upon the Tenth Amendment or whatever other provisions you might want to look at. Is that not constitutionally based?

Mr. GALSTON. Absolutely. But now consider the example that Senator Lieberman gave a few minutes ago of Internet regulation. It seems to me, it is much harder to approach that question with a clear set of presumptions in one way or another, because on the one hand, you have technological change inserted into the requirements of the national marketplace, which is increasingly functioning in a global economy, as we are all aware, and on the other hand, you have a profound, important, and growing set of interactions with State and localities' ability to raise revenues.

So it seems to me it is a question of prudence, judgment, and balance to have a dialogue across the lines of the Federal system to come up with a solution that accommodates the different interests as much as possible, and that is an example of the sort of thing I had in mind.

Chairman THOMPSON. I take it, basically, you would look at it sort of as each side has a competing constitutional basis it can rely upon. One side has the Tenth Amendment; the other side has the Necessary and Proper Clause and the Supremacy Clause and the Commerce Clause. In any given situation, we look at all of that and come up with a solution based upon the facts of the situation, not necessarily historical interpretation as to those particular constitutional provisions.

As the Professor points out, the Constitution theoretically remains the same. As we all know, through interpretation, it changes some. Technology is always changing. How do we strike the balance? Then I will let Professor McGinnis comment.

Mr. GALSTON. The Constitution——

Chairman THOMPSON. I am just trying to get kind of an analytical framework. What do we go through? It is not going to be a matter of, well, what do we think this morning would be smart to do. I mean, we do have a Constitution to deal with.

Mr. GALSTON. We do, indeed, and the Constitution has a text and it also has a history of interpretation, which I alluded to very briefly in my remarks. So, as I think Professor McGinnis would agree, the meaning of the Commerce Clause has been elucidated in a series of Supreme Court decisions stretching back almost to the beginning of the republic. There was a great debate between the forces of Alexander Hamilton and the forces of Thomas Jefferson as to the presumption that should be brought to the interpretation of the Commerce Clause, and I think most historians would agree that the expansive Hamiltonian interpretation won out in those decisions of John Marshall.

So that is part of our constitutional tradition. But to get to the broader point, I do believe that in many cases, there will be competing constitutional and policy and prudential considerations which will be attached to different layers of the Federal system and it is going to be a matter of judgment, prudence, and balance to bring them into the most fruitful conjunction that best serves the public interest. I wish I could give you a simpler bright line, but I do not think it exists.

Chairman THOMPSON. Do you want to comment on that, Professor?

Mr. MCGINNIS. I would just like to comment on it briefly. Constitutional federalism cannot only be a matter of prudence. That is illustrated by difficulty with our structure now, because the States really do not have any protections other than at the discretion of Congress, and that in a political sense deprives the States of their few defenses. It makes government bigger because interest groups can always come to the Federal Government and essentially nationalize debates and issues, and that is a problem.

The Framers' Constitution did not make federalism a matter of sufferance of the Federal Government, because they would understand if it is not a matter of sufferance the Federal Government would be where the presumption of action always would tend. It would tend to the people who have the most power.

It is my sense in looking at the Constitution that these matters were not really settled by Alexander Hamilton or John Marshall but much more by the New Deal court, which largely eviscerated all of the enumerated powers. Before that, there was not the plenary spending authority and plenary regulatory authority in the Federal Government, which we essentially have today.

Without some lines, and I have tried to suggest a new way of drawing lines in my testimony, I think you do not have the constitutional restrictions on government which the Framers thought you needed to make the competition work, because they understood that competition will not work if you have one side saying what the rules are, one side both the umpire and the competitor. That is not competition. So that is why I think you need to revive, as Governor Leavitt said, an enforceable federalism.

Chairman THOMPSON. The strength of the National Government, I think, to me, is evidenced by the fact that some of the people pushing in favor of nationalizing some of these rules are normal critics of the Federal Government, and many in the business community in this area because it is much easier to do business under one rule. They look at all these issues in terms of that, what is easier to do business, and it would be. But it goes directly against, many times, in my opinion, concepts of federalism, which you would ordinarily expect them to be supportive of.

Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman. That is a good point.

Thanks to Professor Galston and Professor McGinnis for their very thoughtful papers, and thanks to you, Mr. Chairman, for calling them. Professor Galston is someone I have known for a long time. He bears the burden of having spent much of his earlier life in Connecticut. I am pleased to say that his parents are still my constituents, and I have benefited greatly from his work over the years, though, as they say in the preface to the book, I do not hold him accountable for anything I have done with the ideas that he has written.

Professor McGinnis, I am becoming familiar with your work and I respect it greatly. Of course, you came to all of our attention as one of those commentators during the recently concluded national trauma.

Mr. MCGINNIS. This is a much happier experience, Senator.

Senator LIEBERMAN. That is exactly what I was going to say. It is much more pleasant for you to return to constitutional concepts of federalism.

I thought that Professor Galston made an interesting point in his statement, which is that over our history, one of the reasons why the Federal Government's power has grown is, ironically, to protect the freedom of the individual, the equality of the individual, which was, after all, the original motivating force of our founding documents, certainly the Declaration of Independence right of each individual to life, liberty, and the pursuit of happiness. So it is ironic, in a sense, that we have the big Federal Government having entered, particularly in matters of civil rights, to protect the rights of individuals.

I wanted to ask you, Professor McGinnis, just to give me your reaction to that, and then to ask Professor Galston, and perhaps you, too, to comment on the point that he makes in one of his four final recommendations, which is that the discharge of this obligation, that is, the obligation to protect the rights of individual citizens, will not always be consistent with the preferences of other actors in the Federal system.

Mr. MCGINNIS. Well, Senator, I certainly agree with the point that civil rights have been a crucial addition to our Federal system. Surely even regulatory federalism as I described it could not work for people who could not move from their States, who could not send their capital from their States, and so the Fourteenth and the Fifteenth Amendment were crucial completions to even a system of regulatory federalism. But they went beyond that in giving responsibility to the Federal Government to enforce rights.

I think that system has generally served us well. My own testimony, as you will note, did not call for what actually some people who favor more federalism are in favor of—namely doing away with the incorporation doctrine, for instance, of the Fourteenth Amendment.

I think my focus is really on regulation and on spending rather than on rights. I would say that it is not entirely clear to me that every job and title of incorporation has always been good, because I do think there is an experience, as Chairman Thompson has suggested. It is particularly dangerous for the Federal Government to get things wrong, and the Federal Government can even get things wrong on rights. It can get things wrong on the relations between civic responsibility and rights in a variety of areas.

So if I were to discuss the incorporation doctrine, which I do not in my testimony, I would try to figure out ways of tempering that and allow some competition even among rights to happen among the States, but with the basic rights being protected by the Federal Government.

So I agree, that civil rights are a very important completion of our Federal system. But I think civil rights are really not largely the cause of the pictures Chairman Thompson has given us today, the huge growth in government. My focus on reviving regulatory federalism would not be so much to do away with our centralized structure of rights but our centralized system of spending and regulation. I understand they cannot be completely disentangled from

one another, but I think there can be some kind of separation between civil rights and budgetary matters.

Chairman THOMPSON. Professor Galston, I wonder if I could invite you to comment a little bit more on the concept, and also perhaps to indicate that, now that we are in a time where devolution seems to be more in favor, whether this means either that individual rights do not need the protection of the Federal Government anymore or whether they are, in some sense, thereby jeopardized in the face of State and local majorities.

Mr. GALSTON. Let me begin by saying that it is a matter of national consequence when the Federal Government gets things wrong. The Chairman is absolutely right about that.

But in the area of civil rights, the Federal Government got things wrong for 100 years not by acting but by refraining from acting, and I think there is an important historical lesson in that.

Senator LIEBERMAN. Right.

Mr. GALSTON. So the logic of that argument points in both directions.

I think there is a substantial measure of agreement on the general point here, but I do want to underscore something that was in my written testimony. Namely, these rights can be created by acts of Congress as well as by legitimate constitutional interpretation. For example, the Americans with Disabilities Act, I believe is going to have and is already having profound consequences, not all of them entirely welcome, for State and local actors and for the private sector, as well.

I have not heard an orgy of reconsideration in the halls of Congress as to the wisdom of that legislation, and that would be a contemporary example where the Congress in its wisdom, across party lines and with full cooperation of the legislature and the executive, created a new, enforceable right, which, whether we like it or not, enhances the power of the Federal Government in many respects. Now, perhaps on this panel, we could renew that debate right now, but I happen to think that it is going to take some prudence in judgment and perhaps even some legal tussles in order to come out with a balanced enforcement strategy for that act. But it is there, and I think, on balance, it is a good thing for those individuals and for the country as a whole that it is there.

Senator LIEBERMAN. Thank you both for those answers.

Let me take up the discussion that the value, that both of you commented on and the intention of the Framers in creating a Federal system to protect interstate commerce. That inherently involves some limitation of State and local authority. My question is—although I am mindful of what you said, Professor Galston, which is that you are wary in this area of any generalized presumption for or against any particular level in the Federal system, that it is hard to make broad-based rules here—but to continue to maintain the interstate commerce, the free market nationally, inevitably entails a curtailment of State and local authority in some cases.

Maybe I will direct this to you first, Professor McGinnis. What is the overview? If you were going to construct some rules here for when we should do that and when we should not—of course, there is a great body of constitutional law in this area and I am asking

you one of those questions which your colleagues at your university would give you some good responses for, suggesting the impropriety of the question—what would you respond?

Mr. MCGINNIS. I think, first of all, I would say that as a matter, just if I were to advise you, as a matter of constitutional law, essentially, you can do what you would like in the Federal Government today, as I think Senator Thompson very nicely suggested. Even the *Lopez* decision can easily be gotten around. In my class, I tell the five ways of getting around the *Lopez* decision and allowing that regulation at issue in case to go through, consistent with our structure now.

So the question really is a matter of prudence under current law, and I would suggest, at least under our current system, that Federal responsibility really is about allowing markets to be open, preserving the free flow of goods and services among States. That is the crucial role for the Federal Government to protect, against regulations that would be parochial in the sense of favoring citizens of one State against one another, they should be done away with either by an act of Congress or even perhaps through the dormant Commerce Clause.

But otherwise, I think, in regulations—where there are not spillovers between the States—where the costs of the regulation are borne by the people in the States, either in labor regulation or in some kind of environmental regulation, then I do not think the Federal Government should generally step in, because I think economists have suggested that when there are not large spillover effects between the States, and I would argue that there are a variety of regulations, that do not have a lot of spillovers among the States, that the State regulation imposes costs on wages and people in their States can make a good trade-off between the benefits of regulations and loss in wages. They may make a different trade-off in Alabama and they may make a different trade-off in Connecticut.

But that is, in my view, the appropriate distinction between the Federal Government's role and the State's role, the Federal Government simply opening borders and dealing with spillover effects and the States dealing with regulations that largely have effects only within their State, or effects largely within their State.

Senator LIEBERMAN. Professor Galston, let me ask you to just comment a bit more and expand on the statement you made in your testimony, which is that we have got to be open to the possibility that economic, technological, and social changes will require the reconsideration of long-established Federal-State relations in regard to the free and open national market. What were you thinking of?

Mr. GALSTON. Well, nothing that the Senate of the United States has not been thinking about for quite some time, and the Congress of the United States as a whole. Jim Leach, for example, has given a series of interesting speeches over the past couple of years suggesting that changes in the national economy, global capital flows, etc., require a fundamental reconsideration of the way we legislate and regulate in the area of banking. People disagree as to the remedy, but I think everybody agrees that we are in a new world, economically speaking, that is going to require some new thinking.

Similarly, as we have mentioned more than once this morning, the Internet is changing everything and its impact goes well beyond the very important consequences for State and local capacity to raise revenues. It is reconfiguring relationships in a way that the Congress of the United States is going to have to take cognizance of, in a way that is consistent with our Constitution, the Commerce Clause, etc.

I could go on and on with example after example of economic, social, and technological change which is forcing us to rethink and react and do things differently, whether we like it or not.

Senator LIEBERMAN. Professor McGinnis, at one point in your testimony, you described the passage of the Sixteenth and Seventeenth Amendments as unfortunate, and I wondered if you believe——

Mr. MCGINNIS. I did not quite say they were unfortunate. I just said they had consequences that were.

Senator LIEBERMAN [continuing]. Consequences which were departures from the intention of the Framers. The irresistible question is, do you think that the direct election of Senators was an unfortunate departure?

Mr. MCGINNIS. Senator, I certainly think that it was an inevitable departure with the sense of the importance of popular sovereignty and popular democracy, and certainly I am not here to urge, particularly before this body, an amendment to get rid of it.

But I would say, though, that the amendment had consequences that we have to think of for our Federal system, and I am with Governor Leavitt in that. The whole burden of my academic work is to try to think of new ways of limiting government that are appropriate to our era. You cannot go home again to the original Constitution. You cannot get rid of the income tax. You cannot get rid of the direct election of Senators. But you can think of what is a constant problem in any era, which is how to deal with the Framers' eternal questions about human nature, the questions about how do we protect ourselves from government and make the limitations appropriate to our era, and that is what I have been trying to do in my testimony.

So, no, it is no part of my testimony to eliminate them or to say that they were wrong, just to say that we need to do some compensatory work now.

Senator LIEBERMAN. That is a good point. Of course, each of our reaction to the Seventeenth Amendment would depend upon our evaluation of the sentiment of our respective State legislatures. But it was a significant change and, of course, had effects on our service since then.

Thank you both very much. Mr. Chairman, thanks for an interesting hearing.

Chairman THOMPSON. Thanks very much.

I am going to take another minute or two. We touched on some court decisions. Just generally, I would be interested in your views as to the significance of some of the decisions. We pointed out some of the limitations of *Lopez,* the *Pritz* decision, a couple of others that seems to indicate that courts, maybe the Supreme Court, is tilting back the other way a little bit. Do you see very much signifi-

cance in that? Does it portend things for the future? How would you categorize it?

Mr. MCGINNIS. I think there are two issues. I raised two kinds of issues in my testimony, first that the dissolution of federalism has hurt government accountability and second that it has also simply made government bigger because it has given the Federal Government more power.

I think on the accountability issue, the court has done a pretty good job, or it has done a fairly decent job of starting to make the Federal Government at least accountable for the decision it makes. Because of the current court Congress cannot, for instance, tell the State legislatures to pass legislation that Congress would like, because that is the basic problem of accountability because people are then confused. Who is responsible for this limitation on our liberty? And I think, similarly, the *Pritz* case is very important in promoting accountability.

However, I do not see that the court has really changed the fact that the Federal Government has plenary, regulatory, and spending authority, and I think, Mr. Chairman, you were absolutely right in just referring to what happened after the *Lopez* case. You essentially were able to pass the same bill by changing it just slightly, and you could have passed it in a variety of other ways by making it a condition of Federal spending. So I do not think it has changed that, and——

Chairman THOMPSON. You do not see that there are any new limitations on the Commerce Clause of any substance?

Mr. MCGINNIS. I do not think that they actually restrain the substance of what the Congress can do when it really wants to act, and I think the court really believes it cannot do that because precedent is so much against it in that respect. If it really did that, because the court does not act only prospectively, as Congress does, it would cast out a lot of Federal programs that we have come to rely on, for better or worse.

Chairman THOMPSON. What it did do is elevate the debate a little bit, or cause a debate among a few of us who thought it was worth talking about. So we at least caused them to have to go back and do it again and debate the issue. Perhaps that is a little progress.

Do you share his analysis of these court decisions or what they mean?

Mr. GALSTON. I guess my bottom line, Mr. Chairman, is that I think they are a bit more significant than that because I think they represent a change in a way of thinking, which, over time, will have practical and not just theoretical consequences.

For about 4 decades after the beginning of the New Deal, I think that we did function juridically as well as legislatively with the presumption that the power of the Federal Government was essentially unlimited and that the General Welfare Clause of the Constitution was the most operative clause of the Constitution. That was the clear lesson of the New Deal in a number of respects.

Starting in the mid-1970's, the courts and legislatures, to some extent, began to reexamine that assumption, in my judgment, for good reason. First, circumstances changed, and second, a case could be made that under the influence of a national economic emer-

gency, the court suspended certain niceties which otherwise it would have been strongly inclined to observe, and, indeed, did try to observe for the first 2 or 3 years of the New Deal.

So I see a pendulum swinging back, a new balance in the making, juridically speaking. I think that the *Lopez* decision—I am not a constitutional lawyer, but I have it right here in front of me and I have considered it very carefully—I do think that the *Lopez* decision, in trying to restore juridical scrutiny of questions like, what is commerce, anyway, and what is interstate, anyway, and what does it mean to substantially burden interstate commerce, anyway, has put a new set, or, should I say, an old set of questions on the table that we are going to be wrestling with for the next generation, and I would not be surprised in 20 years if you reconvene this hearing if there would not be quite a significant change.

Chairman THOMPSON. As I said, I think it does cause us to at least address the question of whether or not something that has been the province of the States and local communities for 200 years is a good idea for us to federalize. It is happening in a lot of areas. It amazes me, the philosophical positions people get in. We are making decisions up here on our tort law based on whether or not we think there are too many lawsuits and not based on what level of government should be dealing with these, whether or not we want to federalize something that has been the State and local government province for 200 years. So I think the debate is good.

The final thing is, and this really calls on your expertise as much as it does your general citizenship, one of the things you both agree on is that observing concepts of federalism would assist in this age of cynicism on the part of the American public. It is something that concerns me a lot. In times of peace and prosperity, we do not pay much attention. Issues of government, in general, are less relevant to us, and we see how quickly things can change and we get our attention gotten in a hurry and we realize, perhaps, that we do need to have some confidence in our government and even confidence in our Federal Government. So anything that we can do to enhance that becomes important.

I think each of you agree that the proper observance of principles of federalism would help there, but more importantly, do you, as men of the law, and I know, Professor, you were with the government for a while, do you see that as a problem in society, the level of cynicism, the way people are looking at their government these days? Each of you may answer.

Mr. GALSTON. It is a good thing, Mr. Chairman, you did not put that question to me when there was more time to answer it, because it is the question that interests me most passionately of all that you could have posed.

But very briefly, I think we live in an era of almost unprecedented cynicism and mistrust, particularly directed towards our national political institutions. Some of it is warranted; much of it, in my judgment, is not, and I think it creates tremendous problems for self-government and for democracy and it is something we have to take very seriously with everything we say and with everything we legislate and regulate or otherwise do.

For that reason, I suggested in my written remarks, and will repeat now, that you can help build trust through empowerment and

through participation and through processes of local government which are more transparent, where people can actually see the relationship between their influence in the form of political participation and outputs in the form of public policy to promote the public good.

So I think that in current circumstances, there are substantial reasons to devolve as much as can reasonably be devolved, consistent with the general welfare.

Chairman THOMPSON. While I have got you, what other things do you think we should do? Expand on it a little, if you would, the nature of the problem. You have obviously given a good deal of thought to it, as I have. What are the manifestations and what are some things that we can, totally apart from anything else we have talked about, what are some things that you think that we could do to help in that regard?

Mr. GALSTON. No more difficult question could have been posed, but let me just cite a couple of obvious things, all of which you have spoken out on, Mr. Chairman.

First of all, although this is enormously complicated legislatively, it is clear that, as compared to 30 or 40 years ago, the American people see a Federal Government more dominated by "special interests" and the money behind them than they thought was the case a generation ago and they do not like it. I know of all the practical arguments against legislating in this area, but as a matter of public confidence and public trust, I believe that it is important for the Congress of the United States to address that issue in some way.

A second point I would make is that as in war, so in domestic policy, there must be a proportionality between means and ends and between promises and performance. I think it is very important for elected officials on every level, as they are crafting and then selling a program, to be realistic about what it will and what it will not accomplish. I mean, if you promise the new Jerusalem and you have just taken one step out your front door, the American people are aware of the disproportion between promises and performance. It does not breed trust.

One other point I would make is that I think a series of decisions made by the political system at every level, including the political parties, has increased the power of the media in determining public attitudes towards government at the expense of participatory political structures, such as political parties.

I think the political parties have backed out of the political arena. Forty years ago, they were actual operating structures that connected individual citizens through local and State party institutions, to the national political party, so the political conventions were real and parties were participatory arenas. They have become now shells, and other forces that do not breed public trust, have rushed in to fill the void, and I would think very seriously about——

Chairman THOMPSON. There is a serious chicken and egg question there, too.

Mr. GALSTON. Yes, there is. But I think it is important to rethink what we have allowed to happen to our political system and its important participatory structures.

Chairman THOMPSON. Thank you. Professor McGinnis.

Mr. MCGINNIS. I think I have a slightly different perspective. I am less, myself, concerned about spending on elections than on the output of government. I think the change to cynicism is caused by a change in what government does.

Government can do a variety of things. One, it can focus on public goods. Public goods are those that the market cannot provide, that the family cannot provide, things that benefit everyone. If government is focused on that, and I believe federalism and a whole variety of other structures in our government tried to focus only on producing such public goods—national defense, protection against crime, infrastructure, to name a few examples—then people are brought together by their government because these things are benefiting them all.

On the other hand, if you have a much larger government, a government that consists as, alas, a lot of the spending which is supported by today's taxes does, in transferring money from one group of people to another group of people, then people will be necessarily suspicious of government because that will encourage citizens not to focus on what government can give them to benefit all, but what they can get from some other group of citizens for their own benefit.

So I think that is the basic problem for cynicism of government, and, therefore, I would think whatever one's views about campaign finance, it is a mistake to believe that such reform is the real solution to cynicism. Big spending on elections is simply a consequence of big government. Special interests pay a lot of money to the government because there are so many transfers possible from the government, and limiting these transfers is the level at which I think we really need to address it by much more restricting government.

I have some sense of that because I am about to go off to be a professor in Italy, and there, when I talk to people, they are far more cynical of government than we are in the United States, and that is because, in my view, their government is even a much less-restrained government than ours.

So it is simply not a consequence, I think, of our political system, but fundamentally what government does. A limited government focused on what we have in common makes for people who will feel good about government. A government that is focused on transferring resources from each of us to another divides the Nation.

Chairman THOMPSON. Gentlemen, very well said, both of you. I really appreciate that.

You touched on something that has always been of interest to me with regard to the size and growth of government. I really think we need to make some changes in our campaign finance system for a variety of reasons, but a lot of the advocates of changes in that regard, I do not think face up to the fact that the basis for that is what you alluded to, is big government. The reason why the special interests flock to town, and you cannot wade through them some days, and the reason they give such large amounts of soft money is because they have got so much at stake right up here, because we are running everything right up here and the decisions we make are worth millions and millions of dollars to these people, sometimes billions.

But my thinking is that there is something we can do about the money coming in a whole lot more readily than we can in changing that big thing around. We have got to do both, though, I think.

But thank you very much. This has been extremely helpful and we look forward to working with you in the future. I appreciate it.

Mr. MCGINNIS. Thank you.

Mr. GALSTON. Thank you.

Chairman THOMPSON. We have got a vote on right now. I wanted to come down and chat with you a moment, but we will not have time today, but thank you very much for being here.

The record will remain open for 5 days after the conclusion of the hearing.

The Committee is adjourned.

[Whereupon, at 12:18 p.m., the Committee was adjourned.]

FEDERALISM AND CRIME CONTROL

THURSDAY, MAY 6, 1999

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:33 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Fred Thompson, Chairman of the Committee, presiding.

Present: Senators Thompson, Voinovich, and Durbin.

OPENING STATEMENT OF CHAIRMAN THOMPSON

Chairman THOMPSON. The Committee will come to order, please. I welcome everyone to this hearing of the Governmental Affairs Committee to consider federalism and crime control.

Today is our second hearing on federalism. The Committee will consider the increasing federalization of criminal law. It is a deeply rooted constitutional principle that the general police power belongs to the States, not to the Federal Government. This was clearly articulated in the Founding Fathers' careful constitutional design. As Alexander Hamilton said, "There is one transcendent advantage belonging to the province of the State Governments, . . . the ordinary administration of criminal and civil justice."

For most of America's history, Federal criminal law was limited to national offenses, such as treason, bribery of Federal officials, counterfeiting, and perjury in Federal courts. Yet, in this age of mass media and saturation coverage, Congress and the White House are ever eager to pass Federal criminal laws in order, as Chief Justice Rehnquist put it, "to appear responsive to every highly publicized societal ill or sensational crime."

In recent years, there has been an explosive growth in Federal criminal law. A recent ABA Task Force report, entitled *"The Federalization of Criminal Law,"* found that of all the criminal provisions enacted since the Civil War, over 40 percent were enacted since 1970.[1]

No one really knows how many Federal crimes now exist, but recent estimations of 3,000 have been surpassed by the surge in Federal criminalization. In 1995, the Supreme Court sent a clear message to the Congress in the *Lopez* case that it needs to carefully consider whether federalizing certain crimes is consistent with the Constitution. But only the following year, Congress—over my objection, I might add—re-enacted the Gun-Free School Zone Act. And there is no slowing in the growing number of proposed Federal

[1] A copy of the ABA Task Force report, *"The Federalization of Criminal Law,"* has been retained in the files of the Committee.

criminal offenses, many of which do not even attempt to make the case that such crimes ''substantially affect interstate commerce,'' as the Supreme Court requires.

Although a more vigilant court could help preserve federalism, it may be difficult indeed to increase Congress' respect for the constitutional and prudential limits to passing crime legislation.

There is growing consensus across the criminal justice system that the increasing tendency to federalize crime is not only unnecessary and unwise, but also has harmful implications for crime control. Those concerned include prosecutors, judges, law enforcement officers, defense attorneys, State and local officials, and scholars.

The ABA Task Force report cites many damaging consequences of federalization, as we will hear today. There will be times when enacting Federal criminal laws or placing conditions on receipt of Federal criminal justice funds will be appropriate. But in all too many instances, increased Federal involvement in the criminal law will pose more possible harm than benefit.

Many leaders in the criminal justice system are counseling restraint when Congress and the White House consider Federal criminal legislation.

We are fortunate to have a distinguished group of witnesses today, and I look forward to hearing their views.

Senator Durbin, do you have any comments?

Senator DURBIN. I will waive the opening statement. Senator Lieberman has a prepared statement for the record.

[The prepared statement of Senator Lieberman follows:]

PREPARED STATEMENT OF SENATOR LIEBERMAN

Thank you Mr. Chairman. Let me start by thanking you for holding this hearing today. The issue of the appropriateness of making Federal crimes out of conduct that is traditionally regulated by the States' criminal justice systems is an extraordinarily important one. And, although you didn't know it when you scheduled this hearing, the topic is also a particularly timely one, in light of the events in Littleton, Colorado and with the Majority Leader having announced his intention to take up juvenile crime legislation on the floor next week.

As you have well explained, we in Congress are often far too quick to respond to every high profile crime with a proposed law, and we often don't stop to think about whether Federal action is either necessary or wise. I've reviewed the ABA Task Force's excellent report on this topic, and both it and today's witnesses make a compelling case for those of us in Congress to make sure that we take better account of the differing roles of the Federal and State criminal justice systems—and of the resource limitations on Federal law enforcement and the Federal judiciary—when we consider crime legislation.

With that said, I think we also need to be careful not to overstate the case here. I read with interest the often repeated finding that, of all Federal crimes enacted since 1865, over 40 percent were created since 1970. Although it certainly is an interesting fact, it does not necessarily say to me that we in Congress are doing anything wrong. After all, we probably would find that a far greater percentage of our Federal environmental laws or perhaps even our Federal workplace safety laws have been enacted since 1970, but I would argue that neither those facts, nor the increasing rate at which we have been regulating crime at the Federal level, in and of themselves suggest that Congress is wrongly intruding in matters that don't concern it.

After all, as we all know, violent crime has become a much greater problem in America in the latter half of this century, and so it is only natural Congress would begin to legislate on it more than it did in the past. Just as importantly, and as we discussed yesterday, it shouldn't surprise any of us that the Federal Government is regulating more conduct today than it did 50 or 60 years ago and that conduct that once may have been the exclusive province of the States—because it once had almost exclusively local consequences—now is, and should be, regulated on a na-

tional scale. We live in an increasingly interconnected Nation, where our transportation and telecommunication systems have allowed seemingly local activities to have increasingly interstate effects, and that is surely so for crime.

I'll give just one example. The Bureau of Alcohol, Tobacco and Firearms recently issued a report on the source of guns used in crimes committed in 27 cities across the country. Although the ATF found that the State in which the crime was committed generally provided the largest single source of traced crime guns, a significant portion of guns used in crimes originated outside of the State in which the crime took place. In Bridgeport, Connecticut for example, the AFT found that over 35 percent of the crime guns it traced were originally purchased outside of Connecticut.

By raising this issue, I don't mean to suggest that any criminal activity, no matter how essentially local in nature is an appropriate subject of Federal criminal jurisdiction—in fact, I find the ABA's report quite persuasive in many respects. I do mean to suggest that it is enough to say that because the States have traditionally regulated things like drugs and guns, they should continue to do so to the exclusion of the Federal Government, regardless of the changing—and increasingly interstate—nature of drug crimes and gun crimes.

I expect today's hearing to be quite interesting, and I look forward to hearing from and discussing these issues with our witnesses.

Chairman THOMPSON. All right.

I would like to recognize our first panel of witnesses. We are pleased to have with us today the Hon. Edwin Meese III, who was our 75th Attorney General. Mr. Meese serves as the Ronald Reagan Distinguished Fellow in Public Policy at the Heritage Foundation, and Chair of the American Bar Association's Task Force on the Federalization of Criminal Law, which has given rise, I think, to a new level of interest in this area, and we certainly appreciate that effort.

Following Mr. Meese is the Hon. Gilbert Merritt. Judge Merritt presides over the Sixth Circuit Court of Appeals. He is an old friend of mine from Nashville, Tennessee, and we are very pleased to have you here with us today, Judge Merritt. I want to thank both of you for being here.

Mr. Meese, would you like to proceed with your testimony?

TESTIMONY OF HON. EDWIN MEESE III,[1] FORMER ATTORNEY GENERAL OF THE UNITED STATES, RONALD REAGAN DISTINGUISHED FELLOW IN PUBLIC POLICY, THE HERITAGE FOUNDATION, AND CHAIR, ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW

Mr. MEESE. Thank you, Mr. Chairman and Members of the Committee. I appreciate this invitation to appear at this hearing on the topic of federalism and crime control. As you pointed out, as a former Attorney General of the United States and chairman of the American Bar Association's Task Force on the Federalization of Crime, I appreciate this opportunity to share some thoughts with you. At the same time, I should make it clear at the outset that these views are my own and do not necessarily represent those of the organizations with which I am affiliated or the policy of the American Bar Association.

As you pointed out, Mr. Chairman, the Criminal Justice Section of the ABA created a task force in response to widespread concern about the number of new Federal crimes that have been created over the past several years by Congress. Its initial objectives were to look systematically at whether there has been, in fact, an in-

[1] The prepared statement of Mr. Meese appears in the Appendix on page 239.

crease in Federal crimes which duplicate State offenses, and if so, to determine whether that development adversely affects the proper allocation of responsibility between the National and the State Governments in the very important field of crime prevention and law enforcement.

The members of the task force, I would like to explain to the Committee, were selected with the explicit goal of including persons with diverse political and philosophical backgrounds. It was felt that the task force's conclusions and recommendations should be the product of a consensus among respected persons whose views on criminal justice issues generally would vary quite widely.

Indeed, Mr. Chairman and Members of the Committee, I don't think you could find in one room as many diverse views as we had in the particular membership of the task force.

We included, for example, former U.S. Senator Howell Heflin, and a former Congressman, Robert Kastenmeier. We had a former Deputy Attorney General of the United States, a former chief executive of the Law Enforcement Assistance Administration; former State attorneys general, present and former Federal and State prosecutors, State and Federal appellate judges, a police chief, private practitioners who specialize in criminal defense, as well as scholars for the legal academic community.

I would like it to be part of the record of this hearing that we benefited greatly from the very excellent assistance of Professor James Strazzella of Temple University Law School, who served as the reporter for the task force and who was the principle author of the report which the Chairman made reference to. We also had the invaluable research assistance of Barbara Meierhoefer, who handled the collection and analysis of criminal justice statistical data.

The task force examined the U.S. Code, data available from a variety of public sources, the body of scholarly literature on this subject, the views of professionals in Federal and State criminal justice systems, and the experience, the rather extensive experience, of the task force members themselves.

The task force had several meetings. There was a great deal of work done by individual members on their own. And, of course, we had a great deal of expertise, as I mentioned earlier, including one of the persons who will appear later on one of your panels, Professor John Baker.

As the Chairman noted earlier, the task force concluded that the evidence demonstrated a rather recent dramatic increase in the number and variety of Federal crimes.

The task force also concluded that much of the recent increase in Federal crimes significantly overlaps offenses traditionally prosecuted by the States. This area of overlapping crimes is basically at the core of the task force study and the report which it has provided.

The federalization phenomenon is inconsistent with the traditional notion that the prevention of crime and the enforcement of most public safety laws in this country are basically State functions. There was a nearly unanimous expression of concern from thoughtful commentators that the new Federal crimes duplicating

State crimes became part of our law without any request for such enactment from State or Federal law enforcement officials.

The task force looked systematically at whether new Federal criminal laws, which were popular when enacted, were actually being enforced, and we determined on the basis of the available data that in many instances they were not, that the laws were passed at a time when there was a great hue and cry about a particular infamous incident, but that later on, when it actually came to the implementation of those statutes, there was very little actual prosecution. So it was in a sense the feel-good enactment of laws, with very little follow-up.

The task force also recognized the point that was made earlier by the Chairman, and that is the plea of Chief Justice William Rehnquist who deplored the expanded federalization of crime in his annual report to the Federal judiciary, which was filed last December.

The task force found that increased federalization is rarely, if ever, likely to have any appreciable effect on the categories of violent crime that most concern American citizens, and we specifically found that there were numerous damaging consequences that flow from the inappropriate federalization of crime. These include some of the following: An unwise allocation of scarce resources that are needed to meet the genuine issues of crime; an unhealthy concentration of policing power at the national level; an adverse impact on the Federal judicial system—again, having been pointed out specifically in the Chief Justice's report; inappropriately disparate results for similarly situated defendants, depending on whether the essentially similar conduct is selected for either Federal or State prosecution; a diversion of congressional attention from criminal activity that only Federal investigation and prosecution can address; and, finally, the potential for duplicative prosecutions at the State and Federal levels for the same course of conduct, in violation of the Constitution's double jeopardy protection.

Mr. Chairman, we would certainly subscribe to your comments as to the constitutionality of this whole business. Indeed, the Framers that you quoted made it very clear that the police power belonged with the States rather than with the Federal Government.

It is interesting to note that as early as the 1930's, when this trend began, FBI Director J. Edgar Hoover, probably the most outstanding law enforcement official of our century, pointed out the dangers of a national police force. Even though his allies in the Congress at the time wanted to make the FBI separate from the Department of Justice as an independent agency and give it national police powers, he resisted this because he felt it would be an unconstitutional infringement on the States and instead as a substitute added the National Academy for the training of local and State police officers to the FBI's own training programs so that local law enforcement officers could be trained and then return to lead their own forces at the State and local level.

In the course of our deliberations, we received statements from numerous law enforcement organizations throughout the country. The National Sheriffs Association, the National District Attorneys Association, the Police Executive Research Forum, and a number of other organizations provided their views. Uniformly, they sup-

ported the conclusions in the task force report that the federalization of crimes already on the books at the State level should be something to be avoided in the future and even to be looked back on, those that are already in existence, and to be considered for extinction.

There are many more things I could say about the problems related to the federalization of crime, but they are reflected in the report. And I would ask, Mr. Chairman, that the report of the ABA Task Force on "The Federalization of Criminal Law" be accepted by the Committee for inclusion in the proceedings of this hearing or for whatever other purpose the Committee might desire. I have provided copies to the reporter and to the Members of the Committee, and additional copies are being sent for those Committee Members who are not present.

Chairman THOMPSON. Very good. Without objection, a copy will be made part of the record.[1]

Mr. MEESE. I might point out that there are presently pending before the Congress of the United States several bills which would, in fact, continue this trend. The so-called hate crimes legislation, new gun laws that have recently been spoken about, and so on, are examples of this unfortunate trend, and perhaps this Committee, one of the possible results of this Committee's deliberations might well be to raise the issues of federalization of crime in regard to this pending legislation.

The task force recognized that the federalization of local crimes is not something that is going to be easily solved as far as Congress is concerned. Obviously, many of these issues are politically popular, and many of them are generated by newsworthy cases that have raised a great deal of attention throughout the country. And it will take a high level of sophistication, a high level of congressional restraint, if you will, not to succumb to the popular trend to say let's pass another Federal law.

The Committee has specifically made some suggestions as to how the Congress might deal with this problem. These are included in the report and in my testimony, but let me briefly just summarize them:

First of all, to have a recognition within Congress and among the public on how to best fight crime within a Federal system where authority, particularly the police power, is divided between the Federal Government and the States.

Second, focused consideration of the Federal interests in crime control and the risks that are entailed in the federalization of local crime, many of which I have already referred to.

Third, Congress might well institute some institutional mechanisms to further restrain additional federalization, such things as an impact statement or analysis by the Congressional Budget Office, perhaps, or by the Congressional Research Service, as how to propose new Federal crimes impact or overlap and duplicate State and local criminal laws.

In addition, the task force suggested that Congress might consider having a joint congressional committee on federalism. I would

[1] A copy of the ABA Task Force report, entitled *"The Federalization of Criminal Law,"* has been retained in the files of the Committee.

suggest, Mr. Chairman, that the deliberations of the Governmental Affairs Committee itself are a very important step along the lines that the Committee had recommended. But the whole idea of a federalization assessment by Congress as it contemplates action on these kinds of laws would itself be a very important step forward.

Perhaps another institutional mechanism would be a sunset provision in any new criminal laws where they would automatically expire at the end of some period, perhaps 3 or not more than 5 years, so that they can be tested, first of all, to see whether they have an adverse impact on State laws and, second, to see whether they are, in fact, used very much and whether there is a need.

Finally, a means of responding to public safety concerns through Federal support for State and local crime control efforts. Indeed, this has been used in the past whereby many times, if there is a problem at the State or local level, it is a lack of resources, and it would be far better, rather than to pass a new law, a new criminal law that overlaps, if Congress wishes to do something about a problem, to provide block grant funds to local law enforcement to take care of the problems.

Another possible remedy that has been suggested would be to require through statute as an element of any Federal prosecution that the U.S. Attorney show in each criminal case before a judge that there is an element of Federal jurisdiction. I believe my colleague on the task force, Professor John Baker, who will testify later, will elaborate on this particular point.

In summary, Mr. Chairman, the expanding coverage of Federal criminal law, much of which has been enacted without any demonstrated or distinctive Federal justification, is moving the Nation rapidly towards two broadly overlapping, parallel, and essentially redundant sets of criminal prohibitions, each filled with differing consequences for the same conduct. Such a system has little to commend it and much to condemn it.

In the important debate about how to curb crime, it is crucial that the American justice system not be harmed in the process. The Nation has long justifiably relied on a careful distribution of powers to the National Government and to State Governments. In the end, the ultimate safeguard for maintaining this valued constitutional system must be the principled recognition by Congress of the long-range damage to real crime control and to the Nation's structure caused by inappropriate federalization.

In the course of these remarks, I have included liberal references to the task force report. Again, let me mention that I alone am responsible for the totality of the views I have expressed today, and the task force report itself is not official policy of the ABA inasmuch as such policy can only be expressed when approved by the Association's House of Delegates.

However, in closing, Mr. Chairman and Members of the Committee, let me state that I believe that these comments and conclusions, as well as the recommendations, would be helpful to this Committee and to the Congress in its consideration of the Federal responsibility for crime as well as those areas where the Federal Government should not be directly involved.

Thank you for the opportunity of presenting these views before the Committee. I would be happy to respond to any questions as

well as both now and in the future provide whatever further information might be of assistance to you in your endeavors.

Thank you.

Chairman THOMPSON. Thank you very much, General Meese.

Judge Merritt.

TESTIMONY OF HON. GILBERT S. MERRITT,[1] JUDGE, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, NASHVILLE, TENNESSEE

Judge MERRITT. Mr. Chairman and Members of the Committee, I will be fairly brief. I take my text here from the remarks recently of Chief Justice Rehnquist whose view, I think, in this respect represents a consensus view in the Federal judiciary, perhaps not unanimous but I think a widespread consensus view. And he recently said, "The trend to federalize crimes that traditionally have been handled in State courts not only is taxing the judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our Federal system."

When you look at the large historical context, you remember that in our mother country there was a time a number of centuries ago that there was a lot of local criminal jurisdiction in England. Over the course of five, six, or seven centuries, all of that criminal jurisdiction has now been subsumed in the central courts at Westminster. There isn't any longer any local jurisdiction in the country from which our legal system arose, our common law system of justice. And we have only been at this enterprise here in the United States, as we know, for a couple hundred years, but we are proceeding apace at a pace about the same as in England.

I might say that one of the big problems, somewhat unrecognized, one of the causes of this federalization of crime, is not just elected officials reacting to the last crime that has been given major publicity in the press. There is among the staff in the Department of Justice, among a lot of very good people, a general tendency, kind of an instinct to expand its jurisdiction. It is natural for governmental bureaucracies to expand or want to expand their role and scope.

Since my time as U.S. Attorney more than 30 years ago, I have watched the Department of Justice during that time and since then come up with new legislation in the criminal field in response to the demand that we cure some local problem. And we have had a great number of local crimes federalized in that period of time.

The answer that the Department of Justice critics of federalization give when called upon is a variation on a theme, and this is kind of the theoretical basis for a continuation of the expansion of Federal crimes. And I quote here from a very able man, Roger Pauley, Director of the Office of Legislation for many years of the Criminal Division in the Department of Justice, and a man who conscientiously promotes this theory. And it is a debatable theory. He says, "The scope of Federal criminal jurisdiction is not and never has been the proper measure of federalism." That federalism is rather maintained by Federal restraint in the exercise of already frequently plenary jurisdiction, for example, over drug crimes, rob-

[1] The prepared statement of Judge Merritt appears in the Appendix on page 247.

beries, auto thefts, domestic violence, fraud, extortion, etc., along with Federal limitations placed by Congress on Federal enforcement activities.

Now, under attorneys general for many years of both political parties, that position has been one that has been promoted in the staff, at least, and frequently by appointed officials in the Department of Justice as a justification for federalizing new crimes and bringing within the scope of the enforcement power of the Department of Justice new crimes to deal with events that at the time seemed justified.

The truth of it really is that since the Department of Justice has become a major Federal bureaucracy with a substantial staff, beginning a couple of generations ago, in the 1920's and 1930's, the federalization of crime has proceeded apace. It is not just the last 30 years or since the Second World War. Bank robbery as a separate crime, the Dyer Act, auto thefts across State lines, and many other Federal crimes were adopted prior to the Second World War. And I think that we overlook one of the major causes of this if we don't attribute it at least in part to the rise of a very substantial Federal permanent staff which instinctively supports many expansions of Federal jurisdiction.

Now, I know the Members of the Committee have observations and questions, and I will leave there my own views which I have set out. I would say that there is a set of principles for determining what should be federalized in the way of crime and what should not be federalized. And I think these principles are of long standing. As the Chairman mentioned, they go back to the Founding Fathers.

And the jurisdiction ought to be, in my view, limited to the following five areas which I will briefly summarize: One, offenses against the United States itself; two, multi-State or international criminal activity that is impossible—not just difficult but basically beyond that—for a single State or its courts to handle; three, crime that involves a matter of overriding Federal interests such as civil rights matters; four, widespread corruption at the State and local levels; and, finally, crimes of such a magnitude or complexity that Federal resources are required, and that would now be mainly international-type crime.

Obviously, the Federal Government has got to get involved in Internet crimes across national boundaries, which is rising, and in money laundering across national boundaries and in international Mafia or international terrorism. With the first thing that should be considered is now repealing a lot of laws that are no longer needed in this area.

I think that if this Committee and others in Congress would give some thought to the repeal, it would be certainly a controversial matter. But the repeal of some of the laws that are now on the books and are unused, it would be helpful.

Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much.

Well, I think that every citizen ought to read this ABA Task Force report on *"The Federalization of Criminal Law."* As General Meese said, it is very much an eclectic group including Mr. Meese, of course—just a few names—Susan Estrich, Howell Heflin, and

you mentioned former Congressman Kastenmeier, Robert Litt, James F. Neal, a friend of Judge Merritt's and mine from Nashville, Tennessee, and a prominent lawyer, Don Santarelli.

And the conclusions that you came to here really are eye-opening. I think to me, the fact that more than 40 percent of Federal criminal laws have been enacted since 1970, and the fact that we really don't know how many Federal criminal laws there are. Some people use the figure 3,000, but considering the fact that some of these statutes are so complicated and convoluted, it is difficult to tell just how many provisions there are in some of these statutes that have criminal sanctions attached to them, not to mention administrative regulations now. So many of them have criminal sanctions attached to them.

It was pointed out over a thousand bills were introduced in the 105th Congress having to do with criminal law—of course, we will talk about juvenile crime a little bit later—many of them having to do with juvenile crime even though there is only about 250 or so prosecutions of juveniles in the Federal system every year. So we are talking about an infinitesimal number here.

Between 1982 and 1993, the Federal justice system expenditures were twice that of State and local expenditures. And, of course, much of this deals with matters that are left to the States. And then you deal with the results of all of this, and apparently from all of this there has been no real significant impact on public safety because by the very nature of the Federal system, you can only reach a small percentage of the crime involved. Less than 5 percent of the prosecutions are Federal prosecutions.

Many of the new statutes that we pass in response to recent events—drive-by shootings, interstate domestic violence—since 1994 they have been on the books, and I know in 1997 there was not one prosecution brought under either one of those statutes.

So, ironically, it seems—and, General Meese, I will let you address this, if you would—that in this area we are federalizing, but it is not enough to do any good in terms of reducing the crime rate, really. We would have to have basically a Federal police force in order to really do some good in that regard. But it is enough to swamp our court system in some respects and violate certain of our principles and increasing Federal presence and power. So usually there is a trade-off. There is some good for some evil here. I have a difficulty in seeing what the good is here in that, as I say, it seems like we are not doing enough to really have any effect on the problem, and yet in trying to do so, we are creating some really disadvantageous situations. Is that a fair assessment?

Mr. MEESE. Yes, it is, Mr. Chairman. The task force found, for example, that it diffuses accountability and responsibility. People don't know whether to complain to Congress and their Federal Government or to the State legislature and their local law enforcement agency.

I might point out in regard to what you said about Federal resources, there are only approximately 10,000 agents of the FBI, about a quarter of the police force of the city of New York alone. We have 500,000 State and local law enforcement officers. It seems frivolous almost to add to the jurisdiction of the FBI such things

as deadbeat dads and some of the other similar crimes that have been assigned Federal jurisdiction by Congress over the years.

Likewise, there are fewer Federal judges in the entire Federal judiciary than they have in the State of California. And, again, even a few cases or a small number of cases can swamp those Federal resources.

But the real problem is it makes the public think that something is being done when actually there is really very little impact on public safety itself.

Chairman THOMPSON. Well, I think maybe the greater problem is the fact that it may be swamping our resources. We are dealing now daily in the newspaper with the allegations that our most sensitive nuclear secrets over the past 50 years have been stolen, have been subject to espionage in this country. There are allegations concerning the nature of the investigation, whether or not it was effective. Everyone is in turmoil about it. And we are passing things like the Animal Enterprise Terrorism Act, the Odometer Tampering Act, and theft of livestock. We have federalized those areas now.

Senator DURBIN. Cattle rustlers.

Chairman THOMPSON. Cattle rustlers, and guns in schools, a battle we had last year, where every State in the Union has already got a law in this area. Now we apparently want FBI agents going around and monitoring your local school house in every rural district in the country. So we clearly have got our priorities messed up in that regard.

Judge Merritt, with regard to the court system, some say that because we don't use these laws that we are passing, the federalization that we are doing now, that it hasn't had that much effect on the courts. Can you talk a little bit about the change that has taken place in the Federal court system? We all know what it was originally designed to do. It was mostly a civil court system. You had a Federal question. You had diversity jurisdiction. And some say once upon a time you had a fairly leisurely pace.

What is the situation with the Federal court system today? And to what extent does this federalization play a part in it?

Judge MERRITT. Well, let me give you some examples. I think they represent the general trend that the Chief Justice mentioned in the statement I gave.

In my own court, the Sixth Circuit Court of Appeals, I have been a member of that court for 22 years, and when I became a judge on the Sixth Circuit, we had from 230 to 250 direct criminal appeals or criminal cases a year, and now we have about a thousand. Most of those cases, a majority of those cases are drug-related cases. Of course, those cases are ones that are duplicate cases with the State Governments, and many of them are just regular run-of-the-mill drug cases that could easily be prosecuted in the——

Chairman THOMPSON. Possession cases?

Judge MERRITT. Distribution and possession cases, firearms cases, and they are——

Chairman THOMPSON. What kind of firearms cases? Is that mostly possession illegally?

Judge MERRITT. Felon in possession of firearms, things that are also State crimes.

In our home town of Nashville, where we both served as U.S. Attorneys, now I am told about 60 percent of the prosecutions in Federal court are drug-related, drugs and firearms cases. Then the rest of them are usually——

Chairman THOMPSON. Do you know how many assistants they have in the Middle District?

Judge MERRITT. They have got about 20 now. When I was U.S. Attorney, I had four.

Chairman THOMPSON. I was there right after you, I think, and we had five, I think, the early 1970's.

Judge MERRITT. But there has been a big increase in Detroit, for example, which is part of the Sixth Circuit, from the time I was U.S. Attorney. I think it has gone from about 25 to 150 or perhaps more now, and a corresponding increase in the size of the staff. And most of that has been the result not of prosecuting core crimes against the United States itself or against officials of the United States or some kind of crime that addresses itself directly to the United States as an entity. It is mainly because of the prosecution of duplicative State crimes.

I am not arguing that there should be no Federal laws that are in the area where the States have plenary jurisdiction, but they should be much more limited than they are.

Chairman THOMPSON. But isn't the basic problem that there is really no way, philosophically or practically, to increase the number of courts and the number of Federal judges to keep up with this? I mean, you have got to either start dealing with them faster, which, of course, the quality is going to go down——

Judge MERRITT. Well, what has happened in our court I think is a good example. It has happened to other Federal courts. About half of the orally argued cases in our court are criminal cases. That used to be 15 percent. The reason is we have maintained the attitude that before you go to the penitentiary, you at least ought to get a opportunity to have a oral argument, have your lawyer——

Chairman THOMPSON. A disturbing presumption.

Judge MERRITT. Yes, a lot of courts of appeal—some courts of appeal have just forgotten about or done away with oral argument in many criminal cases. We still try to maintain oral argument in criminal cases, and that has eaten up our oral argument docket so that now we are having telephone oral arguments, for example, in the court of appeals in order to keep up with the criminal docket. Next week, two judges and I, a panel of three, will hear seven cases next Wednesday on the telephone in an effort to——

Chairman THOMPSON. How do you know if the lawyers are standing or not? [Laughter.]

Judge MERRITT. We know they are sitting.

Chairman THOMPSON. I was not aware of that. Is that a recent—are other courts doing that, telephone oral arguments? I have never heard of that.

Judge MERRITT. There may be one or two, and there is more of this videoconferencing that is going on where the lawyers stay at home and sometimes the judges stay at home with a video monitor and you try to overcome the expense and the inefficiency of travel as a result of that.

Chairman THOMPSON. Let me get in one more question before my time runs out here. General Meese, you referred to this, our tending to want to respond to the tragedies that we are experiencing. They come all too often. All of us have a natural response to want to do something, ask questions and so forth, and we in Congress are no different, and probably more so than most. We have seen the discussion, heard the discussion that has come about from the recent tragedy out in Colorado. People are searching for reasons. People are trying to come up with solutions and things of that nature. Some of them have to do with potential legislation. Some of them to do with cultural issues which present different kinds of constitutional questions and problems. Others have to do with preventive legislation. Another one has to do with punishment. Others have to do with gun control.

From your experience and your observation, relate what we are talking about today, that is, the federalization of basically things that are already State criminal laws, preempting—or duplicating, I guess I should say, the State criminal justice system. What are your thoughts about what we should or should not do in response to that?

Mr. MEESE. Well, Mr. Chairman, I don't believe that there is any need whatsoever for any new Federal laws that would arise out of the tragic circumstances in Littleton, Colorado. Indeed, one of the persons who has done research on this has found that it was not a problem of inadequate laws. It was the fact that people broke laws. And they pointed out the fact that some 19 different laws were on the books that pertained to the violations that occurred as a part of that tragic circumstance out there. So it is a matter of enforcing the laws we have on the books, not trying to make a lot of new ones.

And certainly the points you make, dealing with cultural problems, dealing with new preventive techniques, it seems to me that the Founders in the Constitution were quite right in saying the States should be the ones where they have the ability to experiment with different things, and if they don't work, then they can change them at the State level rather than having a sweeping generalized Federal law which would apply to all 50 States in trying to deal with very intricate moral and cultural matters which are best addressed at that level of government closest to the people.

Chairman THOMPSON. It seems to me that there is a general proposition that we are searching for questions right now is a point in favor of federalism and different approaches and different venues to these problems to see what does work.

Senator Durbin.

OPENING STATEMENT OF SENATOR DURBIN

Senator DURBIN. Thank you, Mr. Chairman.

General Meese and Judge Merritt, thank you for joining us. I am not going to rise to the occasion of the last question because I have different views than the Chairman on such things as whether States can adequately regulate the sale of guns over the Internet or whether the Brady laws should be extended to gun shows, all of which I think may have some bearing on what is happening, not

only gun violence in Littleton, Colorado, but across the country. But I really want to focus on a much different question.

I agree, incidentally, with the findings of this report and with the Chairman's conclusion that we should encourage all of our colleagues to read it closely because it really puts an amazing perspective on what the Congress views as its role in the results of our legislation. But I would like to really look at this issue from a different angle than the commission and, frankly, from the testimony here, focusing less on what goes into the system and more on what comes out of the system. And let me tell you exactly where I am headed.

General McCaffrey, our drug czar, testified last year before the Senate Judiciary Committee, and I asked him point-blank whether the statistics that I had read were accurate, and they were as follows: African Americans comprise 12 percent of the population of America; they comprise 13 percent of people committing drug-related crimes; they comprise 33 percent of all arrests for drug crimes, 50 percent of all convictions for drug crimes, and 67 percent of all incarcerations for drug crimes in our country.

I also note here that the sentencing under Federal law and Federal Sentencing Guidelines for drug-related crimes, as noted on page 30 of the report, is dramatically higher in the Federal courts than it is in the State courts.

There was a survey done by *The Tennessean* newspaper back in 1995 which took a look at sentencing across the Federal courts of the Nation and came to the conclusion that African Americans were more likely to be sentenced to 10 percent longer sentences for Federal crimes than whites.

Now, let me hasten to add that this was not a Tennessee or a Southern phenomenon. In fact, the opposite is true. The disparity was highest in the Western part of the United States in Federal courts. It was next in my area, the Midwest, 12 percent; the Northeast, 10 percent; and the South, 3 percent. So this is not a Southern Federal court phenomenon. It appears to be a national problem, much worse in the West and Midwest than in the South or the Northeast.

The point I am getting to is this: If we are to create more drug crimes, as we have, if we are to create sentencing guidelines, and if the net result of that is to incarcerate more African Americans, disparately larger numbers of African Americans, and to sentence them to longer sentences in the Federal court system, what is coming out of this system is exceptionally perverse. And I would like your thoughts on that.

It is my estimate, at least in 1995—and I am sure the figures have changed somewhat—that about 6 percent of the Federal judiciary were African American, and we find a system now that is unfortunately producing results that are prejudicing at least one group in terms of incarceration and sentencing. So as we federalize, as we impose more sentencing guidelines, are we going to exacerbate this problem, General Meese?

Mr. MEESE. Well, I would be interested in the source of the statistics because most of the surveys I have seen do not show that kind of a dichotomy on a racial basis in sentencing generally.

Now, it may well be—and particularly in the Federal system—that the sentencing guidelines, it must be that there is some—if those statistics were correct, that there would be some unusual perversion of the sentencing guidelines. Perhaps Judge Merritt has had experience in this regard to be able to answer this question, but it seems hard for me because the sentencing guidelines were designed to regularize sentences without regard to external, nonrelevant factors, and to concentrate on specific criteria relating to the crime rather than to the criminal, particularly the irrelevant characteristics that you mentioned.

So I also would be interested in the source of the statistics in the sense that I don't know how they can find that 13 percent of—that African Americans compose 13 percent of those who commit drug crimes but 33 percent are arrested, since how do you know who is committing drug crimes other than by arrests. So the statistics intrinsically have some question as to their validity as to that factor.

In terms of the convictions and the incarceration rate, you would have to look in much more detail as to the particular offenses charged and so on.

In the Federal system, most of the drug crimes relate to the distribution of drugs, the transportation, illegal importation and that sort of thing, the more serious drug crimes. Often possession may be the actual charge, but that is not what the person has done. It is what they are able to prove in a particular instance. But obviously any racial basis, as I say, based on irrelevant characteristics should not be a factor in either arrests or convictions or punishment. And so it would be interesting to delve behind those statistics if they are, in fact, true.

Senator DURBIN. Thank you. Judge Merritt.

Judge MERRITT. Well, let me say about the sentencing guidelines—and this is, I am sure, a voice in the wilderness. I have said many times the worst thing that ever happened to the Federal courts was the sentencing guidelines. And the result of the sentencing guidelines has been sentences which are much harsher now than ever. And the drug war has been a part of that situation, and the theory of the sentencing guidelines no longer has anything to do with rehabilitation. It is altogether—the theory of it is deterrence, mainly, and to some extent vindictiveness or retribution.

So the sentencing guidelines themselves are extremely harsh. The Federal judges have supposedly considerably reduced discretion in sentencing than previously.

Now, on the question of disparate treatment of African Americans, I read the series in *The Tennessean*, because that is the newspaper that I read, and discussed the problem with some of the people over there, and in my view, it could be true but the statistical basis for it was somewhat flawed. For example, it didn't take into account the criminal history situation entirely of the people being sentenced.

At the same time, however, I am not sure that it is wrong. It is just that you can't tell whether it is right or wrong. And they did a conscientious job, and it is worth raising the issue, certainly.

But the sentencing guidelines themselves are a major problem for the Federal courts. One of the reasons they are such a problem for our court is the number of appeals has grown tremendously.

Everybody appeals the sentence, and this is a major problem for us. Our resources are—we are struggling to keep up. One reason is the sentencing guidelines.

Senator DURBIN. I will make just two observations, Mr. Chairman, before ending my questioning, and that is, Congress is at fault here as well, and I would confess to be part of that problem as part of Congress. For example, the disparity between sentences for crack cocaine as opposed to pot or cocaine is going to have an impact more on certain groups in our society, namely, African Americans.

The last point I will make is that I have a genuine concern about the integrity of our judicial system and the respect which we have to have for it if it is to succeed and if that respect is not—if we do not strive to make that respect universal, I am afraid that it will be very difficult for those who are charged with enforcing the law to do their job.

Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Senator Voinovich.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. Well, first of all, I would like to congratulate the Chairman for following up our hearings on federalism with this particular subject of federalizing crime. I have been concerned a long time about Federal preemption of State law and local law, and I am hoping that perhaps with some legislation here we can cause our staff to look at whether or not various laws that Congress is considering preempt State and local laws and perhaps have a presumption that says that they don't.

But I hadn't thought about the federalization of crime until you raised it at this hearing, and it gets back to a pet peeve I have had for years, and that is that all the polls always show crime is an issue, and a dime will get you a dollar that most of the laws on the Federal books today are a result of those polls that said somebody has got to have something on their record to show they have cracked down on crime and they can go back and campaign on it or do a 30-second commercial.

I think, Mr. Chairman, that these five recommendations of Judge Merritt are very good and that perhaps we ought to have these as guidelines before we pass any more Federal legislation in the area of crime, and that we should highlight that of all this legislation that is passed, very little is enforced. It is all form and no substance that has led to public cynicism and we ought to do more about that. And I think most people also, Mr. Chairman, look at dealing with crime and that their logic tells them it is a State and local matter.

The other thing that it is a commentary on is the fact that today in our society, instead of really looking at the problem with the right perspective, we are all interested in the silver bullet. It's the easiest thing. That's the problem. We had the Littleton thing; let's pass a couple laws and everything is going to be fine, and then we go off and do something else, instead of taking the time to look at what the real problem is.

I will give you an example of it. Two years ago, or 3 years ago, Professor John DiIulio over at Princeton was talking about the up-

coming predator generation, that our demographics show that we are going to have a lot more younger people in this country, and as that goes up we are going to have some real problems in the year 2010, 2015. So I had called a juvenile crime summit in Ohio in 1997, and it was very interesting that many of the people who were proposing we need tougher laws on crimes and longer sentences and more boot camps and all the rest of it, that the real experts said that the real problem dealt with other things. And it reminded me initially of something that the man who ran our prison system in Ohio once said when we were talking about how to reduce the population in Ohio's prisons, and he said "Head Start," that we have got to get people early on in their lives and make a difference.

It is interesting. Professor DiIulio said the big problem today is that people are growing up in moral poverty, which he describes as "the poverty of being without loving, capable, responsible adults who teach you right from wrong." And I think that this whole tendency to pass a law and assume that the problem is taken care of is a cop-out and that we need to be a lot more thoughtful in some of these areas where we think that we are going to be making a difference.

Mr. Chairman, one of the things you are going to be hearing from me is that I am going to be promoting more activity on the Federal level in reordering priorities to deal with the prenatal-to-three area, which all of the experts say is probably the most important area in the development of a child, which we completely neglect.

The point I am making is that we need to spend a lot more money early on making a difference in the lives of the people in our society instead of dealing with the problem later on. And in Ohio, in terms of the Federal crimes, Mr. Chairman, the Federal prosecutors usually tell the State guys, you handle it, we haven't got time for it, besides that you have got the jails and we haven't got the jails. I mean, there is a lot of that going on at the local level.

I think probably the most positive thing from my observations over the years—and I would be interested in, General Meese, your observation—is the coordination in terms of enforcement between local and Federal officials. I experienced as mayor of Cleveland several instances where there was no coordination, and everybody was off doing their thing, DEA, FBI, Treasury, and local prosecutor, local police. If we really are interested in making a difference in terms of crime in this country, more emphasis ought to be placed on coordinating the activities of the various law enforcement officers so that they can work together to really make a difference. I would be interested in your comment on that.

Mr. MEESE. Well, thank you, Senator, and you are absolutely right; it is the coordination between the various law enforcement agencies at all levels of government. Your own experience in a sense parallels my own. We have both served at both the local, State, and now Federal Government in your case, and mine when I was Attorney General.

One of the principal objectives during the time that I served in the Department of Justice was to advance that kind of coordina-

tion. We organized the Law Enforcement Coordinating Councils in each Federal district, bringing together local chiefs of police, sheriffs, and State officials of the State Department of Justice, along with our U.S. Attorneys and the various heads of the DEA, FBI, Marshals Service, and the other Federal law enforcement agencies. And this has gone a long way.

In the drug field, for example, the Drug Enforcement and Organized Crime Task Forces, I think this is a very important aspect. In many cases, we don't need additional resources. We need the resources we have working together more effectively and also allocating the responsibility according to what they do best. And one of the things that the proliferation of Federal laws that duplicate State laws does, it destroys that kind of allocation of responsibility as well as hampers coordination if they are all fishing in the same ponds.

Senator VOINOVICH. Mr. Chairman, do I have time?

Chairman THOMPSON. Yes.

Senator VOINOVICH. Does the ABA comment about legislation that is being proposed?

Mr. MEESE. I believe that the ABA may. The task force operated separately from the legislative advocacy branch of the ABA. I don't know whether they do or do not comment on specific pieces of legislation. But I know the task force would hope that when they do consider—and the ABA has a process whereby they take positions only after they have been adopted by the House of Delegates. But we certainly will urge on the House of Delegates, which meets only infrequently during the year, that our report on the federalization of crime be one of the criteria they use in determining the ABA position on specific legislation.

Senator VOINOVICH. Well, I would suggest that they give it serious consideration. I think that if you had a task force that used criteria, perhaps what Judge Merritt suggested, and then you had some criteria in terms of when it was appropriate, and that they would make it a point that when some of this stuff is being considered here that they come in and say it is not needed, it is duplicative, it is not going to help things, that would go a long way to reduce some of these bills that are being introduced here because the people introducing them would know that there is going to be somebody that is going to comment about whether indeed they are really needed.

Mr. MEESE. I think that is an excellent suggestion, and, incidentally, the criteria that Judge Merritt has proposed is substantially included in the report itself, as well, as the basis on which Federal legislation is necessary. So I will certainly pass that on to the appropriate officials within the ABA.

Chairman THOMPSON. What we have run up against is the marrying together between those who seem to always look for a Federal solution, Senator, along with those who want to be tough on crime, and they get together and form a heavy majority. And those who are out there saying, hey, wait a minute, there is absolutely no indication that it is going to do any good, every State in the Union already prohibits this activity. I think last time that came up on the guns-in-school legislation, we got 21 votes, some-

thing like that, for that proposition. So I am glad you are here now, so maybe that is 22.

Senator VOINOVICH. Mr. Chairman, I would also like to say one other thing, that we need to do a little better job talking about the things that work. For example, our State I think is the only State in the country where the number of people in our juvenile facilities has been reduced because several years ago we went to a program called Reclaim Ohio, where we are allowing our judiciary, the juvenile judges on the local level, to find alternative places for these youngsters rather than sentencing them to State facilities. And that took a little money because in the old days, their only alternative was to send them to the State because the State will pay for it. Now what we say to them is if you keep them in the local area, we will give you $75 a day. In other words, they are looking at these youngsters and saying they have mental problems, they have drug problems, but there is a different approach to dealing with this. It is not crack down, throw them in jail, and they are going to be better.

Our statistics show that boot camps, for example, don't work. We have found that boot camps for juveniles really do not help but hurt. I just think that more publicity, more best practices being shared about what really does make a difference needs to be emphasized rather than the silver bullet that so many people would like to advertise and then, as I say, go off and do something else.

Chairman THOMPSON. Senator, you are pointing out something that I think is very important, and while I have still got you here, I would like to address just maybe one further question to you, again, if you please. That is, in response, again, to the current situation that we have, one of the things that we are considering is the Violent Repeat Juvenile Offenders Act. I don't know if you have had a chance to look at that. And since this juvenile crime legislation has been pending—I was on the Judiciary Committee until recently, and my concern has been just what you were talking about. Everybody has got their own idea as to what is a great program. And we sit up here in Washington and decide what makes sense to us. We find out later that either it doesn't do any good, maybe it does a little good, maybe it does harm, but we decide. And then we encourage the States to do what we decide that they ought to do in response to this problem.

My feeling has always been that as far as a Federal role is concerned, one of the things that the Federal Government does better than anyone else, I think, is probably research and development and evaluation. And perhaps maybe we ought to acknowledge our ignorance in these areas and spend a little more time just doing basic evaluation in Washington, making that information available throughout the States, be a clearinghouse for information, programs that are being tried all across the country, what works, what doesn't work, and then let States make their own determination as to what they want to do.

I would like your thoughts on this bill, General Meese. I think the staff indicated that I was going to ask you a question about it. It is complicated. It has many provisions in it, some of which I think are much better than they were. I think there is still some expansion of—we are still into this juvenile gang business. We get

the camel's nose under the tent—juvenile gangs, and then people who help juvenile gangs, then people who help people who help juvenile gangs, and we keep going in that direction. And then there are a lot of grants, $450 million for the juvenile accountability block grant. That is for buildings and prosecutors and things like that, as I understand it; $75 million for juvenile criminal history upgrades; $200 million for challenge grants, that is more in the preventive area, as I understand it; $200 million for prevention grants; $40 million for National Institute of Juvenile Crime Control and Prevention, of which $20 million would go to evaluation and research; $20 million for gang programs; $20 million for demonstration programs; and $15 million for mentoring programs.

With regard to the juvenile accountability block grant, to be eligible for the grants, States must make assurances it will establish, first, a system of graduated sanctions because States don't have enough sense to realize that you ought to have graduated sanctions. We need to tell them that. We will give them the money if they will follow our wisdom because we have got those answers up here.

Second, drug testing for juvenile offenders, I think we could all agree that is a good thing in general.

Third, a system to recognize the rights and needs of the victims of juvenile crime. It is a good thing, but three things, three priorities of a million priorities that you could choose from.

What about all of this? I know you don't have time to address all the details. Is this a right approach? Is it 50 percent right? Should we start all over again in the way we are looking at the problem here?

Mr. MEESE. Well, Senator, Mr. Chairman, my own view is that whether this bill passes or doesn't pass will have zero effect on violent crime or juvenile crime in the United States. It is the local officials, it is the local resources that are going to have the impact on this. There are some valuable things in the bill, namely, it eliminates a lot of programs that the Federal Government is presently engaged in which have been found to be useless or redundant or unnecessary. I think, quite frankly, we have plenty of money now going out of the Federal Government to the States in the juvenile field. I would get all of that money together, divide it by population and on a population or some other similar fair basis give it to the States in block grants and let them decide how best to use it.

Some of the provisions in the bill are pernicious in that it extends the federalization of crime, particularly those that relate to the firearms provision and the criminal gang provision, makes substantive offenses on the basis of Federal law, which is already covered or can be covered by the States if they so desire and see it is important.

So, as I say, if this bill did not pass, it would not have any detrimental effect on the enforcement of criminal law in the States. If it does pass, it is not going to have any real beneficial effect. I would think that, again, the best thing that the Federal Government could do is take the money already going to the States for a whole variety of these programs, give it to them in block grants——

Chairman THOMPSON. Practically every department of government has juvenile crime prevention money. The Department of Agriculture, we found out, has some.

Mr. MEESE. My understanding is that there are some 300 different programs scattered among the various agencies of the Federal Government.

Chairman THOMPSON. Judge Merritt, with regard to the judiciary, I noticed in the ABA report they said from 1980 to 1994 the number of Federal prosecutors increased 125 percent, and the number of Federal judges, both district and appellate, increased 17 percent. So you are being outgunned there in terms of——

Judge MERRITT. Well, we just have to hire staff. The problem in the Federal courts is not only the rise in cases, but something has to give when that occurs, and what concerns me is that the deliberative process itself may be undermined. The Supreme Court can limit its jurisdiction to a certain number of cases a year. The Federal district courts and courts of appeal can't do so. So shortcuts then become necessary, and any shortcut reduces the amount of time a judge has for deliberation and reflection.

I might say on the subject, there is something to be said for Federal action in a symbolic sense; that is, the political arm of the government, the Congress of the United States, sees a problem and they want to act in order to express the will of their constituents. There is, it seems to me, better and worse ways to do that.

The worst way to do it is to permanently federalize the criminal area. The least worst way may be through appropriations of some kind because that is an annual year-to-year process, not permanent, and it may waste some money, but it doesn't undermine the fabric of a federalist society. So when symbolic action becomes necessary through the political process, for example, in response to Littleton and other similar events, there is something to be said for symbolic action, but little to be said for federalizing the matter as a matter of crime, and much to be said for seeing if there is some experimental program that may require some appropriations which can be easily ended from year to year.

Chairman THOMPSON. And perhaps more in terms of evaluation of programs that are——

Judge MERRITT. And research. I think there are a lot of things the Federal Government can do to assist State and local law enforcement. For example, electronic surveillance is assisting State and local governments where necessary in serious crimes. In that respect that is one example.

There is a lot of aid that can be given which doesn't entail or require the creating of Federal crime or bringing some case in Federal court by a Federal prosecutor.

Chairman THOMPSON. That is an extremely helpful and insightful analysis, I think.

Let me ask just two more things. On your five criteria that we are talking about, you said something that was interesting to me. With regard to the interstate-international aspect of it, you said something that is difficult, almost impossible to do otherwise. It is an interstate—it seems to me that the state of the law is—well, not the law but the state of Congress is that if we can remotely attach anything to interstate commerce, it is not a question of whether it

is wise or not, we just go ahead, if we can remotely—or even allege, just allege, we don't even have to show that there is some connection. I take it that then we go ahead and pass laws in that area and say, well, it affects interstate commerce. And, of course, I guess in one sense or another, everything affects interstate commerce. And up until fairly recently, anyway, the Supreme Court has kind of gone in that direction.

I take it that you feel that there not only should be some nexus but there should be some very strong nexus to interstate commerce before we federalize in that area.

Judge MERRITT. Yes, and one of the reasons is because the way the prosecutorial system works inside the Department of Justice is very decentralized; that is, the U.S. Attorneys pretty much have discretion to bring what cases they want to. There are few areas where they are limited and have to get the permission of the Criminal Division of the Department of Justice, for example, in areas like local corruption. But in the main, in the great broad sweep of these duplicative crimes, it is left to the discretion of the local prosecutor. The local prosecutor can bring, as they frequently do and as we see every day, a case that is no different from the case that would be brought in a local police court of the local jurisdiction. It depends on prosecutorial discretion and selection, and there is not much control of that through the Department of Justice, and there is, in fact, a tension between the local—as you may remember, a tension between the department oftentimes and the local prosecutor, a "don't tread on me" sort of attitude. And a lot of cases are brought as a result of that.

Chairman THOMPSON. One final thing. You mentioned in your statement that much of your docket now is drug cases, illegal possession of firearms cases, and that it was having minimal effect on the distribution of drugs and illegal firearms. You said most of your cases, or a good many of them, anyway, are possession cases.

Is one of the places we are missing the boat as far as drugs and firearms are concerned is that we are not drawing a proper distinction between possession on the one hand and perhaps interstate transportation on the other hand, that perhaps if it is an interstate transportation case, those are traditionally Federal kinds of cases and activities? But on the other hand, if it is mere possession of drugs or firearms that are otherwise prohibited by local law, that that is not something that needs to be federalized?

Judge MERRITT. Let me give you an example. It depends on what you mean by interstate transportation or how much interstate commerce you want to say is a prerequisite.

In Memphis, for example—and this is true in a lot of cities that are near the border of the State. In Memphis, there are a lot of cases where the local police officer will make a case, he will stop or she will stop an automobile that is coming across from Arkansas or Mississippi or somewhere, and the law is that you can stop for any reason and then search for drugs, and the reason for the stop is somewhat of a pretext. So the police officer stops an automobile, they find some drugs, and the case is then brought in the Federal court. It may be 10 grams of crack cocaine or cocaine base or whatever. But the car came across the State line——

Chairman THOMPSON. So what you are saying is that even in some so-called interstate cases, it should not be federalized?

Judge MERRITT. Yes. I mean, it is a big country now. I think that—and a lot of State lines—we don't need to prosecute all those cases in the Federal court.

I think the Federal Government, the Federal law enforcement establishment would be much—and the Congress—would be much better off if just as a matter of priority it looked at the international criminal area, which I think is affecting the country now substantially, because this is an area that State Governments can't really deal with. The National Government has to deal with that, and crimes in that respect are crimes against the Nation and fall clearly within our jurisdiction over foreign policy.

So I think that there should be a de-emphasis on these local domestic situations and an emphasis on——

Chairman THOMPSON. The original purposes of the Federal court system.

Judge MERRITT. Right.

Chairman THOMPSON. At a time when we have increasing problems—you mentioned the international aspect of drugs. Practically all illegal drugs come in from a foreign country.

Judge MERRITT. Well, that is true, and then we have gangs. I mean, I have heard a lot and read in the paper of gangs from different countries—the Russian Mafia is coming into the United States. Well, it is hard for State and local people to deal with that kind of problem, and Nigeria, other places.

Chairman THOMPSON. The point being that we have got—I mentioned the espionage case. We have got serious Federal, national problems that require serious Federal resources. And, we are talking about animal hijacking and having FBI agents go out to country schools, presumably to check on kids. We are going the wrong direction there.

I have kept you much too long. I appreciate it. General Meese, do you have any parting comments?

Mr. MEESE. Just that I would strongly support the Chairman's comments on research and evaluation. One of the things is that there is very little evaluation of most of these programs, and rather than end programs that are not effective, we add new programs without looking at those that are already on the books. So I support your comments on research and evaluation, which needs to be done on a national scale, and which outfits like the National Institute of Justice, Bureau of Justice Statistics, and others can be very effective as a nationwide support for local law enforcement.

Chairman THOMPSON. Thank you very much, gentlemen. That is extremely helpful.

I would like to ask our second and final panel to come forward, please. Our first witness will be the Hon. John Dorso, the Majority Leader of the North Dakota House of Representatives, who is testifying on behalf of the National Conference of State Legislatures.

He will be followed by Gerald Lefcourt, immediate past president and legislative committee chair of National Association of Criminal Defense Lawyers.

Our final witness today will be Professor John Baker, Jr., the Dale E. Bennett Professor of Law, Louisiana State University Law School.

Gentlemen, welcome. Representative Dorso, would you like to begin, please?

TESTIMONY OF HON. JOHN M. DORSO,[1] MAJORITY LEADER, NORTH DAKOTA HOUSE OF REPRESENTATIVES, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. DORSO. Thank you. Good morning, Mr. Chairman. As you said, my name is John Dorso. I am the Majority Leader of the North Dakota House of Representatives, and I also serve as chairman of the Law and Justice Committee of the National Conference of State Legislatures. Today I am testifying on behalf of NCSL and, I believe, all State legislators.

First of all, let me thank you for your kind reception of the present president of NCSL, Speaker Dan Blue, yesterday. I understand that went very well. We appreciate that.

I want to thank you for holding these hearings on the issues of federalism and preemption because I think that they are very serious issues. As State legislators, we face what you do every time we go into session. It seems that we in North Dakota are dealing with some more mandates or preemptions that come down from Congress, and it is very troublesome to us that we have to deal with those issues because NCSL's touchstone and my touchstone is, of course, the Tenth Amendment and what is supposed to be reserved to the States. And, of course, the police power is one of those that we believe is one of our prerogatives.

Today, as I was listening here, so much of what was said is what I was going to say that I am going to skip my prepared remarks. As a legislator for 15 years, I guess I don't like to listen to the same things said twice, and I am sure that your Committee has the same opinion. And I certainly don't like to have people read to me, so I am going to skip that.

Chairman THOMPSON. I am used to it.

Mr. DORSO. You are used to it?

Chairman THOMPSON. In retribution, I read to other people. [Laughter.]

Mr. DORSO. Well, I'll try not to.

I think some things have been said today. I totally agree with Ed Meese and the judge. North Dakota, being a small State, I have the ability to visit with our Federal judges. Pat Conmy, who sits in Bismarck, was a former legislator. Rodney Webb, who sits in Fargo, was active in party politics before becoming a judge. And the Federal prosecutor, U.S. Attorney John Schneider, was the minority leader before becoming the U.S. Attorney. So I have a close personal relationship with most of those folks, and I have an opportunity to visit with them about the federalization of criminal issues. And much of what is said today is the same thing they are telling me from their perspective, Mr. Chairman.

The problems that were pointed out here I think are real. There is confusion as to jurisdiction, and that happens a lot, and espe-

[1] The prepared statement of Mr. Dorso appears in the Appendix on page 251.

cially in North Dakota, because we may not have a unique circumstance, but one that Western States suffer, and that is the Indian reservations and the Native American problem, and who has jurisdiction and the resources to deal with those problems.

As an example of that, I will give you the methamphetamine problem. That is starting to centralize itself on the Indian reservations because those that perpetrate that crime find it is easier to do it there than in other parts of our State because of the confusion over jurisdiction, whether you are a member of the tribe or whether you are not a member of the tribe, and the jurisdictional problems. And I think there are a lot of resources being wasted, and I think the judges and the U.S. Attorney would agree with that statement.

Many times we are chasing the same thing to get to a result, and a lot of resources are wasted where really the State could have done it just fine on its own, and the Federal Government could have been taking care of some other cases and what I believe is your responsibility, and those resources would be better spent on those types of cases.

Now, you mentioned the ABA report, and I have had an opportunity to read that, and certainly I agree with the statistics and the conclusions.

One of the things that I looked at in that report and I said, really, why does this happen? I mean, what is the root cause of this happening? And I think you have identified that, Mr. Chairman, as I think a lot of it is politics—and both of us—obviously, you are a U.S. Senator, but I have served in the North Dakota House of Representatives, see it. A lot of it is populist party politics. And it is too bad, but that is real. Any legislative session I am in, there will either be criminal law and/or even civil law that is introduced by special interest groups that seem to come as a reaction to events that have happened—we only meet every 2 years, but in the interim—and then it is very difficult sometimes to say no to passing a new law because it looks good, it sounds logical, but really it should be left, in your case, to us as the States and, in our case, it should be left to the local political subdivisions. And that is difficult to do. I understand that. But it is something that I think we have to be very careful of, and I think sometimes in Congress that hasn't happened.

So I think there are a number of reasons why it has happened. One is the populist politics. The other one is the bureaucracy that was mentioned earlier. We all know bureaucracy in State Governments, just like bureaucracy in the Federal Government, they will feather their nest, they will grow, unless somebody reins them in. And that I believe is our job as a member of Congress or as a legislator, to rein in the size of the bureaucracy and its tendency to overreach its original mission.

Then I think there is another thing here, and that is that you pass it because you can. And that maybe sounds a little bit trite, but, that is a fact. You can, just as sometimes we can. And unless we put some type of restraints upon ourselves, it will continue to happen.

I bring up the context of federalism in general, not just in criminal issues. Unless there is, as was discussed here earlier by the earlier panelists, some way for you folks to draw a line in the sand

to say that you are not going beyond that, which means outside review by CBO or whoever—I have no idea whhere would be the most appropriate place to put that responsibility—to say to you this is where we have drawn the line in the sand. Now, if you choose to go beyond that, that is a decision you can make, but, still, you have gone beyond the line in the sand. And I think that is important. We have tried to do that in the North Dakota Legislature by putting certain procedures into our rules so that when we start trodding on the local political subdivisions, they come in and they can raise a lot of hell with us. And then that tells us we should back off. And I think that there is something that needs to be done in that regard, and I heard that it was discussed earlier.

I think that there are a number of areas that the Federal Government needs to help us in, and I heard that discussed and I agree with that. I also do not subscribe to the theory that all Federal criminal law is bad, because I certainly think that when it comes to organized crime and dealing with the Cali cartel on drugs and stuff, we are not capable of dealing with those types of things at the State level. I think certainly we can be cooperative in those efforts with our local law enforcement officials and State law enforcement officials, but in general, when it comes to international and organized crime to the level of interstate trafficking, etc., we are not capable of dealing with that. I think that the Federal Government has a legitimate role. But I think there needs to be that line drawn, and it needs to be clear, and it also needs to be clear as to what is our responsibility at the State level when we are dealing with those issues.

So, with that, Mr. Chairman, I would rather spend some time answering questions later, but those are my feelings on this issue, and I certainly appreciate these hearings, and I hope that something can come of it.

Chairman THOMPSON. Thank you very much. I appreciate your being here.

It has been a long time, Mr. Lefcourt. Good to have you here.

TESTIMONY OF GERALD B. LEFCOURT,[1] IMMEDIATE PAST PRESIDENT AND CHAIR, LEGISLATIVE COMMITTEE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. LEFCOURT. It has been.

Chairman THOMPSON. I used to pay good money to hear Mr. Lefcourt lecture and learn about the law. Now I don't have to pay, but I am still learning.

Mr. LEFCOURT. I remember those days, and I remember your counselorship on the Watergate Committee, and I really remember it with a lot of fondness and respect.

Chairman THOMPSON. Well, I appreciate that very much.

Mr. LEFCOURT. Mr. Chairman, I, too, am not going to read to you, but we all have our favorite sort of sound-bite stories, and really this hearing could be sound bite or sound policy, a look at the overfederalization of criminal law.

One of my favorites, it is a scary one, and I think you will appreciate that knowing your background in the criminal law. After the

[1] The prepared statement of Mr. Lefcourt appears in the Appendix on page 260.

Atlanta Olympic bombings, needless to say, a shocking, frightening, terrifying event, the administration, before anybody knew what really happened, proposed the most sweeping undertaking of wiretapping that there had ever been in this Nation. As you know, our wiretap laws, both State and Federal, require applications to courts. Those courts uniformly grant them. I think there has been only three in the last 15 years that have been turned down. But, nevertheless, without knowing the cause, the reason, or what have you, in order to act as if something is being done, sweeping wiretap legislation was proposed. And it took Herculean efforts by literally dozens of groups across a broad political spectrum, from the National Rifle Association to the National Association of Criminal Defense Lawyers and the American Civil Liberties Union, and many groups all over the lot to try to derail that legislation.

And this is just the kind of thing that scares everybody, and I think what every speaker here today and yesterday has been talking about: An overreaction, the feeling that something has to be done, some legislation has to be passed, and to hell with the consequences. And this is the real concern. We have submitted, Mr. Chairman, an article by three of us, and this is kind of an unusual and absolutely very creative alliance that was formed 2 years ago by myself as president of the National Association of Criminal Defense Lawyers; William Murphy, the president of the National Association of District Attorneys; and Ron Goldstock, the then-Chair of the ABA Criminal Justice Section, which sponsored the Meese report.

We began to think about these issues and the principal concerns that we had with this type of reaction to highly publicized events, and you could think of many in your own mind during the last Presidential election. And it doesn't matter what party, and we are not looking for a particular result. We are looking for a process.

During the last election, one of the candidates said the President of the United States should be behind victims. Who could argue with such a proposition? And the other candidate said, well, I am going to one up you. I am going to propose a constitutional amendment, the victims rights amendment, and I have read what you, Your Honor, Mr. Chairman, have written on the subject and couldn't agree with you more. And this is the product of the political fray. But, lo and behold, we are becoming dangerously close to actually passing a constitutional amendment where, clearly, statutes should be tried first, as everyone says, and are being tried and tried through the States, and working quite well.

We have on our docket a constitutional amendment that could alter our entire adversarial system in the name of sound bites, with all due respect, because it doesn't matter which political party proposed it. The fact of the matter is such sweeping proposals could have disastrous effects on our constitutional system.

And so the three of us, thinking about things that we agree on, have written a series of articles. The most recent one is my testimony today, which, as I speak, appears in the *National Association of District Attorneys* magazine, the *Defense Lawyers* magazine, and the *ABA Criminal Justice Section* magazine. What it does is, putting all of our talk over the last few days into a concrete piece of legislation which with standing rules from both Houses could result

in a mechanism that could at least some way protect us from sweeping proposals which have very little actual good effect and potential disastrous effect, like the ones we have been speaking about.

This concrete proposal draws on a statute which is already in effect, and that statute requires the Judicial Branch and Executive Branch of government to come in with a prison impact statement with their proposals of new legislation.

You didn't hear me say "congressional" proposals. It is only the Judicial Branch and Executive Branch.

Well, this statute, 18 U.S.C. 1047, could easily be expanded—and that is our proposal—to be a two-fold statute, to have two inquiries: A Federal assessment and it actually picks up on what Judge Merritt was talking about in the five criteria because those five criteria come from the long-range plan of the Judicial Conference. His five criteria are that five criteria, and we adopt it because it is a reasonable look at what the Feds, so to speak, should be involved in. And so it has a two-part component, this statute: A Federal assessment using that five criteria, and then a cost/benefit analysis, using agencies like the Attorney General, the General Accounting Office, but also drawing on States' attorney generals and local, and to see how this proposed legislation, whatever it be, might affect the prosecutorial, judicial, defense functions of State and local governments.

You talk about the juvenile legislation. I guess Attorney General Meese did not know, but the American Bar Association has taken a position against S. 254, as it did against S. 10, which was the predecessor last session. And that is exactly the type of legislation that would benefit by the type of study the statute that we propose in that article would undergo. And one would take a look at it in terms of the Federal assessment criteria and also the cost/benefit analysis.

If you look at the Federal assessment criteria of the juvenile justice legislation, for example, I mean, the notion that you could have children in the United States district court whose feet can't reach the floor from the chair they are sitting on being brought to trial as they would under that Federal legislation at the unreviewable discretion of an Assistant U.S. Attorney—the judge would have no role—and that that child could then be housed, if you will, with adults where we know from statistics that they are 7.7 times more likely to commit suicide when housed with adults, and that we have this whole Federal bureaucracy involving juvenile justice.

I think if you looked at that statute, using the Federal assessment criteria suggested by the Judicial Conference and mentioned by Judge Merritt here, and you looked at the cost/benefit analysis of that statute, and there was some real study that the statute that we propose envisions, I don't think that there would be many people in Congress that would have a problem on how to deal with it.

But now, when any sound bite gets into a piece of legislation and a filing and nobody knows and they are afraid to say no because they don't really want to look soft or they don't want to take the wrong appropriate political position, we end up with legislation that nobody wants.

I think that this issue—and I am so happy that you have decided to have hearings on it—has become so important that it has united—look at the segments of our system that are united. Whether you are talking about the Chief Justice of the United States, the American Bar Association, Attorney General Meese, State legislatures, criminal defense lawyers, State DAs—everybody knows that our sort of predilection for sound bites and spinning has grown just totally out of control. And unless we adopt a statute with teeth that applies to Congress, the judiciary, the executive, and instead of sound bite has sound policy, we are really going down a disastrous road.

So that is our position, and I hope that out of these hearings comes something concrete, a statute that people could get behind. We are certainly not going to be able to stop people from talking, and sound bites and press conferences will continue. But at least we know that they will go into a process, and, again, it is the process that is important, not a particular result.

Thank you very much.

Chairman THOMPSON. Thank you very much.

Professor Baker.

TESTIMONY OF JOHN S. BAKER, JR.,[1] DR. DALE E. BENNETT PROFESSOR OF LAW, LOUISIANA STATE UNIVERSITY LAW CENTER

Mr. BAKER. Thank you, Mr. Chairman, for inviting me to testify. As an academic, I feel some burden to explain that I have not spent all my time in academia. I do write and teach in the area of constitutional and criminal law, but I was an assistant district attorney in New Orleans where I tried many felony cases. I was a consultant to the Justice Department under Mr. Meese, where I worked with the Office of Juvenile Justice. I was a consultant to the Senate Judiciary Committee at the time of the proposed Federal Criminal Code back in the early 1980's, which would have been a disaster had it been enacted. I have argued cases in the Federal courts, including the Supreme Court. Some of this was prison litigation.

I served on the ABA task force with Mr. Meese. Obviously, my views expressed today do not necessarily reflect those of the ABA nor the school at which I teach.

Mr. Meese mentioned that the Task Force included diverse views. In all fairness, it was, if anything, stacked towards the prosecution. Out of the 17 members on that Task Force, 11 were present or former prosecutors, State and Federal. So this was not a defense-oriented task force at all.

Chairman THOMPSON. Well, everybody always admits to having been a former prosecutor. Probably if you look close enough, they were also defense lawyers at one time.

Mr. BAKER. There were actually very few defense lawyers in that group—your friend, Mr. Neal, but there were not that many others. It was, if anything, a prosecution-oriented group. Certainly Mr. Meese fits that description.

[1] The prepared statement of Mr. Baker appears in the Appendix on page 266.

One of the things that I learned in my short time working in the Congress was that the protection that the Founders intended in structuring Congress may work very well when it comes to non-criminal legislation, but the description of the *Federalist* about how the structure of Congress protects our liberty does not work well when it comes to criminal legislation.

We have no need for new substantive criminal law in this country, either at the State or the Federal level—except possibly in the areas of electronic commerce and international relations, etc. This knee-jerk reaction, to pass new criminal laws, is not only a problem in Congress; it is a problem in the States. But there is a difference between the two.

At the State level, there are certain protections that actually limit the damage that State legislatures can do. One of the things that I want to point out is that when Congress pass as criminal legislation, it is not just that it is worthless. It is dangerous. It is much worse than worthless.

Let me give you just three general areas. It is, first of all, a threat to the innocent, which I will elaborate on. Two, it is a threat to democracy and the whole governing structure of this country. Third, it gets the Congress into moral, cultural disputes which it should know to stay away from.

First of all, on the ineffective part, we all know at the prosecutorial and defense level what is driving federalization at the local level. It has to do with longer sentences, as has already by other witnesses. In most States, in drug cases, the Federal sentences are much longer, and, therefore, law enforcement has an incentive to push at least some of the drug cases into Federal court.

In the State I come from, Louisiana, the State sentences are still much longer than the Federal sentences; so law enforcement does not have that same incentive.

In terms of effectiveness, it is not sensible to push cases through the Federal system and it is not simply because they can't handle the case load. From a cost point of view, it makes no sense. You may have heard about Project Exile in Richmond, Virginia. There, the Justice Department, with the cooperation of the local DA, who probably should be unseated for pushing so many cases into the Federal system, wants virtually every gun case prosecuted in to the Federal system. The Federal district judges there have written to the Chief Justice complaining that their court has been reduced to a local police court. But, more importantly, they have pointed out that the cost of trying a Federal gun case is three times the cost that it would be in State court.

Simply from an effectiveness point of view, cost consideration would dictate that you spend the money on the State rather than pushing the cases into Federal court.

Chairman THOMPSON. That is being touted as a national success, and the logical extension of that is that you do it everywhere, which means a national police force.

Mr. BAKER. Right, exactly. I have written about that, and I want to point out that their claim is misleading. First of all, they are citing statistics on dramatic drops, but those numbers do not survive scrutiny. First of all, violent crime stats nationwide are down. They don't mention that. Second, New Orleans just experienced a 31 per-

cent drop in murder rates, without the Project Exile program. New Orleans adopted New York's community policing, which seems to be responsible for its dramatic drop in crime. And that has nothing to do with the Federal Government.

Moreover, we recently had in our State legislature a visit from Mr. Heston, who was promoting this Project Exile. We adopted a Project Exile, but with no involvement of the Federal Government. The main feature of Project Exile is sentencing. If you want to implement Project Exile, all you have to do is have your legislature raise the sentencing possibilities for particular crimes that you are concerned about. Local DA's are perfectly competent to handle these cases, and if they aren't, you need to unseat them and get a different DA. That is what the democratic process calls for.

The biggest problem—which you as a former U.S. Attorney know—is that U.S. Attorneys are not politically accountable. If you don't like what your local DA is doing, you can have an impact on his or her policies. I went in with a local DA who campaigned against certain policies. He got into office, and the people said they wanted those policies continued. He did a 180-degree turn. He had no choice if he wanted to be re-elected.

On the issue of innocence, which is really critical and on which no one else today has focused, it seems to me there is a fundamental difference between substantive criminal law at the State level and at the national level. At the State level, criminal law is essentially based on the common law. Even though we have the model penal code and even though we have revised the common law, we are still dealing with the basic crimes of murder, rape, robbery, burglary, theft, etc. This is extremely important because these cases are ultimately tried before a jury and a jury can recognize a murder, rape, robbery, etc. The problem in Federal criminal law is the great uncertainty in many of the statutes.

The Supreme Court this term has decided two carjacking cases involving uncertainties in the language that Congress had used in drafting this statute.

The uncertainty of Federal statutes is compounded by what the Justice Department does, as indicated by Judge Merritt, and by what the Federal courts have been doing with statutory interpretation. Federal crimes have historically been tied to jurisdictional limits, which complicate a statute, for example, the interstate transportation element of many crimes. Interpretation often distorts the language of the statute. You don't have that problem at the State level. When you get into a Federal criminal trial, the statutory issues can become extremely complex. It is difficult for the jury to understand, in many cases, what constitutes guilt or innocence because the parties involved, the lawyers—prosecution, defense—and even the judge can't agree on what is the essential core of the offense.

While we know what a murder is, who knows what a RICO is? A jury can't recognize that kind of crime. Ultimately, many of these juries are making judgments based on the indications given to them by the court and on whether they view the defendants as "bad actors" or not. This is where the Justice Department comes in.

The Justice Department, since the beginning of the century, has promoted statute after statute that is vaguely and broadly defined, with the attitude of "just trust us," we will only use it in appropriate cases. But the history has demonstrated that they have used it well beyond the original arguments that were used to justify particular statutes.

When it comes to a question of court interpretation, the problem is that the Federal courts have gotten way far away from the old rule of strict construction. They call it the rule of levity, but they have gone well beyond it. And, again, in one of the two carjacking cases, Justice Scalia in dissent was complaining that the majority completely ignored the notion of narrowly construing the statute as they ought to have done.

Ultimately, creating Federal statutes for crimes that should properly be brought at the State level results in bringing and increasing the police power of the Federal Government. As the *Lopez* case said, there is no general police power in the Federal Government. The Congress has legislated well beyond any of its powers under the Constitution. There is no clear connection between the Commerce Clause and many of these criminal statutes.

What the Congress is getting itself into with the police power are moral questions because the police power is used to shape the morality of a community. If you want to live in Las Vegas, where prostitution is legal, gambling is legal, fine, move there. But if you want to live in a more conservative State where prostitution and gambling are illegal, you can go to that State. Those are political, democratic, moral issues that local majorities ultimately decide on.

When you take the police power and move it to the national level, what you have guaranteed is that you will generate more political divisiveness over crime at the national level. For instance, we know that supporters of abortion rights got the Congress to pass the FACA statute, the Freedom of Access to Clinics Act. We also know over the last couple of years that there has been the attempt to get a criminal statute on partial-birth abortion.

Will the Federal Government's policy on criminal law as regards to abortion affect every congressional and Presidential race? Will it turn on who is in the Executive Branch to decide what is going to be the policy of the Justice Department in using its criminal powers in the area of abortion? Or shouldn't this be a matter that is left to the States?

Ultimately, in the early 1980's, that bill that I mentioned, the proposed Federal Criminal Code, which was cosponsored by Senators Strom Thurmond and Edward Kennedy, went down to defeat for totally extraneous reasons—that is, it was a strange alliance between the Moral Majority and the ACLU that ultimately killed the bill.

Unfortunately, when the bill was being considered, a bill of about 500 pages, most of the debate occurred over procedural matters. But of all the 500 pages, most of it concerned substantive criminal law. When I testified on that bill in a House committee and I asked about certain provisions in theft and other areas, the response from the staff was, well, we really don't know what those statutes do because the person who drafted those statutes has left.

Some of the things that would have been criminalized in that bill were amazing. The House bill would have turned a normal accident into a murder if it resulted in death. It would have made corporate executives in this country guilty of murder for accidental deaths in some of their businesses. Sexual conduct between Members of Congress or the Executive Branch and staff members would have been made a felony.

The consequences of many provisions in that bill were little understood. Fortunately, that bill died. Unfortunately, many parts of that bill were passed in the intervening years piece by piece. That is how we have gotten to the point where the Federal police power is so extensive and dangerous, even through prosecutors don't use all the powers of Federal criminal law. The fact is we are not just talking about courts and prosecutors. We are talking about investigation. We are talking about the fact that there are people on the payroll who have to justify what they are doing. There are between 100 and 200 Federal police agencies in this country that have the power to investigate. Whether or not their cases ever result in a prosecution, they can generate grand jury investigations that cause people to have to endure investigation for several years at a cost of several hundred thousand dollars in attorney's fees, only to find out that there really was no case after all. Although there are abuses at the State level, that kind of abuse simply can't happen in State cases because there are other checks. You could never spend the same kind of money in defending typical State cases.

Thank you for listening to my statement.

Chairman THOMPSON. Well, thank you very much. It is hard to know where to start. I could talk for a long time about all these issues.

I am really amazed, as I think about what Mr. Lefcourt said, the confluence of opinions and philosophies and so forth. Everybody who deals with this, whether it be people that have to do with State prosecution, the defense, people concerned about civil liberties, people concerned about the concentration of too much power in the Federal Government, all agree, seem to agree on something that is totally losing in terms of the battle. It really, I think, gives hope that maybe we can do something about it.

We had a hearing yesterday on federalism with regard to the civil side of the ledger. We have got a preemption bill that is, I think, in many respects very much comparable to what you are talking about, Mr. Lefcourt. It requires the Congress to, first of all, acknowledge what it is doing. If it is going to preempt in a civil situation, then it has to then state why. It doesn't go into quite as much detail as probably it should. Then it does an assessment at the end of the year as to the cumulative effect of all of these preemptions and so forth.

But it is even more important in the criminal area because what you have in the criminal area that you don't have in the civil area is what you have in the criminal area in general. I mean, it is coercive power of government which makes it much more significant.

Professor Baker, you point that out. Only 5 percent of the prosecutions are Federal. Many of these laws that we are passing are not being used. They are strictly window dressing out there for somebody to pick up—they pick and choose. But your point is even

though that is the case, what is happening has detrimental effects in terms of the presence and the power of the Federal Government, that it has tentacles perhaps that we don't see in some way. Could you elaborate on that somewhat?

Mr. BAKER. Well, the way I use——

Chairman THOMPSON. What harm is it doing? If we don't have—if it is such a small percentage and we don't use what is happening, anyway, what harm does it do?

Mr. BAKER. Well, you forget that laws, as you well know, can be used to threaten people as well as actually using the laws for prosecution. You certainly know from your experience that when things get testy between a Federal prosecutor and the defense, there is often a threat of prosecuting for obstruction of justice or other similar charges.

But let me just tell you what I tell the opening day to the criminal law class. I point out and I say, look, you may not realize it, but everybody in this room is indictable for something. And they don't believe that initially. And then I ask, well, who has ever been a salesman in here, or saleswoman? Have you ever taken anybody out to lunch, somebody who was about to make a purchase that you wanted their company to make? And, of course, somebody has done that.

I have said, well, did you realize that technically what you have done violates the Federal bribery statute? And, of course, it is not that anyone is going to be prosecuted for that act. But the difference at the local level is that State prosecutors have enough good sense not to get into that stuff. They don't have time and if they did make such a case, they would be laughed out of court.

Federal U.S. Attorneys don't have the same constraints. Some of the theories put forward by the Justice Department are that ludicrous. There is one case, the *Kosminsky* case, in which Justice O'Connor pointed out that the Justice Department theory on what constituted "involuntary servitude" would have made it a Federal criminal offense for a parent to threaten to withhold affection from a child who wanted to leave home. The government admitted that at oral argument.

You get some very bizarre theories when Justice decides that the defendant is a bad actor and that they have to get him somehow.

Chairman THOMPSON. Mr. Lefcourt, how much in human society today remains untouched by potential Federal criminal statutes? I mean, is there any criminal activity today—and, Professor, you, too. Is there any criminal activity today that has not been covered now by Federal law that you can think of?

Mr. LEFCOURT. It is just amazing. Even what used to be regulatory solely, a whole host of them in the securities field, in the environment field, in employee pensions, in welfare plans, in employing of immigrants, there is now a criminal component in all of these areas which used to be strictly regulatory. And it is hard to imagine something that the Feds can't prosecute.

As a matter of fact, of course, you know about the Federal mail and wire fraud statutes, which people sometimes jokingly equate to the old Soviet Union's crime against the State, whatever it means, that through the Federal mail and wire frauds, there is just

about—there is almost no activity that Federal authorities can't grab a hold of if they want it.

But I would add to some of the things that the professor said in terms of the duplication and waste of tax dollars.

I do mostly white-collar criminal defense work, and it is almost a typical scenario that I am worried at the same time about the local authorities and the Federal authorities, and they are both conducting investigations into a whole slew of local issues, whether it be real estate transactions in the city of New York or environmental stuff or Medicaid. They both are on top of it and have jurisdiction and are conducting investigations.

Chairman THOMPSON. Usually Federal, usually based on wire or mail fraud?

Mr. LEFCOURT. Correct, but there are specific statutes in some of these areas as well. And the other thing that is really terrible about it is the effect on local law enforcement because when there is a high-profile case—and I hate to bring it down to this level, but you know that the turf wars exist, and how when there is an important case that has received a lot of attention, both the U.S. Attorney in the area, the district attorney, and maybe some other State authority are all trying to grapple for that prize.

Chairman THOMPSON. Mr. Dorso, how does it make people in the State level feel when the implication is that you are not capable of dealing with a carjacking case?

Mr. DORSO. Well, certainly, Mr. Chairman, we know we are capable of doing it, and that is the frustrating part about watching you folks do what you do.

Chairman THOMPSON. And your association that you have there, what is the group that you are on?

Mr. DORSO. National Conference of State Legislatures.

Chairman THOMPSON. Yes, on the Justice side. Do you ever talk about these issues and what the Federal Government is doing, the conflicts or the things they are doing they should not be doing? What part of it seems to be most disturbing from a State and local standpoint?

Mr. DORSO. Well, yes, we do talk about it. I suspect the No. 1 concern is the Tenth Amendment and the usurpation of States' rights. But I think second of all, and probably my colleagues feel the same, is the unintended consequences that you talked about yourself previously. The tentacles of what happens reach so far into the State and local government, talking about—as an example, someone mentioned mandatory sentencing. Well, then that starts a whole ball rolling, and then we end up with mandatory sentencing at the State level because it is politically really good because the two Senators from North Dakota supported that, so we are going to do it at the State level. And we push that down on our district judges, and now we get prisons, and as an example, our corrections budget has doubled in the last 4 years.

Chairman THOMPSON. These decisions are made at your level, though. You make those decisions as to the trade-offs about sentences versus prisons and taxes.

Mr. DORSO. You are right, Mr. Chairman.

Chairman THOMPSON. And that is something the Federal Government doesn't have to do.

Mr. DORSO. But the professor pointed out, then if you don't, then it becomes a shopping mechanism. What is better—go to the State district court or go to the Federal district court? Who wants to get the credit for this big drug bust?

The intended consequences are those that come about because you have done something, we are going to react one way or another because we either get pressure from local district attorneys or whatever, or the judges come in and they say, hey, we should pass some of the mandatory drug sentencing because we don't want all of these people bringing themselves to our court, we would rather have them over at the Feds.

Chairman THOMPSON. Professor Baker, you write about the confusion with the power under the Commerce Clause with police power, and I think you are absolutely right about that. But there also seems to be confusion that runs throughout our court system. They are buying off into that, and now the *Lopez* case came about, but we re-passed that law making the allegation that it is interstate commerce activity.

Is there any hope in terms of the judiciary, do you see anything there in terms of the difference in the trend? And is it true from a constitutional standpoint that all we have to do is make some allegation of Federal interest or interstate commerce without actually having to prove it presumably in the criminal case that that particular gun did travel in interstate commerce? What is the state of the law, and how do you see it developing?

Mr. BAKER. Well, since the *Lopez* case has come out, the lower Federal courts really haven't taken it very far. A few district courts have. The one exception is the Fourth Circuit which ruled on a statute that has a criminal and a civil side. It ruled in a civil case, and that issue presumably will be decided ultimately by the Supreme Court.

The problem in the Supreme Court, I think, as reflected in the *Lopez* opinion, is that some of the Justices—Justices Kennedy and O'Connor in particular—are concerned to distinguish between the criminal area and not to repeal the changes that came about in the Commerce Clause jurisprudence in 1937. And I think there is a way to distinguish the criminal area from non-criminal Commerce Clause matters, and I think there is something in *Lopez* that provides the basis for doing so.

Lopez mentions that the defect—one of the defects in the statute—was that it failed to demonstrate on a case-by-case basis that the jurisdictional elements were, in fact, met. Now, when Congress re-passed the statute and made findings, that may have helped a little bit, but it doesn't deal with the case-by-case issue. Earlier Mr. Meese mentioned that I was going to propose possible legislation, which in concept I have run by Mr. Meese. It is based on making a distinction between the symbolic, which Judge Merritt was talking about, and the really practical aspects of a prosecution.

What I was suggesting to Mr. Meese was that Congress might consider passing a general statute that applies across the board to all criminal statutes and provides that the prosecution has to prove the jurisdictional elements, not only as part of the case before the jury, but separately to the judge. This would make jurisdiction a legal question to be addressed in every case.

That would allow judges to kick out a lot of these cases that they would love to kick out. For instance, the district judges in Richmond wanted to kick out a lot of these gun cases, but they couldn't go along with the defense theory on unconstitutionality.

What you need to do is give them a statute where they can kick out cases that don't belong there, yet without ruling the statute unconstitutional. I think that the big struggle for the Federal courts is that very few of the judges are willing to say that Congress has gone too far under the Commerce Clause because they don't want to threaten everything that has happened since 1937. A statute that required the prosecution to prove a jurisdictional basis would make it very difficult for Justice to bring some of the screwball cases that they bring.

Chairman THOMPSON. I have a vote on here, unfortunately. Let me ask you very briefly, you have heard the discussion concerning the Colorado situation, the discussion concerning juvenile crime legislation that is pending. Any thoughts about that?

Mr. LEFCOURT. Well, I for one think that the Colorado authorities should be credited for a lot of what they have been doing, and there are, of course, already in Colorado laws that could include the prosecution of families in taking responsibility for their children. I am not saying I advocate such laws, but they already have such things.

It seems to me that what is better than the Senate version of S. 254 is what the unanimous Judiciary Committee of the House in H.R. 1501 has talked about. If we are going to have juvenile justice legislation, theirs is more here is the money, here are the ways you could use it, and we are not going to tell you how to use it, and we are not going to create a better—we are not going to create Federal juvenile prosecutions. You do it, you experiment, as is the State's prerogative, and go from there. And that is supported by both Republicans and Democrats unanimously on the House Judiciary Committee, and it seems to me a better way to go than to create a Federal bureaucracy.

I think what was being discussed before is when you have purse strings, you can have money if you eliminate parole. And now all of a sudden you have prison costs that start to triple. Governor Cuomo during his term in New York is responsible for doubling the prison population. Essentially, prisons are being opened, and libraries and hospitals and other institutions are losing.

Chairman THOMPSON. Professor Baker.

Mr. BAKER. When I was in juvenile justice, I learned that this is really a contest between conservatives and liberals over family policy in the country and each side uses the Federal funding to try to dictate policy to the States. Often, their notion of federalism is that we will tell you how to do it and here is the money to do it. But most of the money that came through juvenile justice served as subsidies for academics. It didn't really go to solve the problems. The funds went to studying the problem because the lobby behind the program consisted largely of academics who needed supplements to their income.

Chairman THOMPSON. What do you think about the notion that we don't really know what the solutions are and let's just kind of

subsidize additional research and evaluation of programs that are out there, that sort of thing? Is that valid?

Mr. BAKER. But research is not objective when you are talking about family issues, which is what juvenile justice is about. We know that there is a strong ideological divide in this country, and so it is going to be a question of who gets control over Federal funds, what academics get the money, and what studies they do. I saw this on pornography issues, on a whole series of issues.

Chairman THOMPSON. In other words, if you give it to academics who think movies are the problem, that is the solution. If you give it to academics who think guns are the problem, that is going to be the solution.

Mr. BAKER. Exactly. You already know when you pick the academic what the bottom line of the report is going to be.

Chairman THOMPSON. So it is like everything else.

Mr. BAKER. Their views are well-known ahead of time. They have written on the topic, so you know what their position is going to be.

Chairman THOMPSON. Well, gentlemen, thank you very much. As I said, we could talk on this for a long time. You have really given us some interesting ideas. Maybe some long-term effort can be put into this and we can work together to maybe get some attention on this.

I think Senator Voinovich said he is very much attuned to the civil side of things, but not the criminal. This is something that could go across ideological lines. It looks like the problem really got started in the 1970's, and we are all guilty to one extent or another for letting this happen. But for any of us who are concerned about our court system, concerned about concentration of power, this is something we really need to give some attention to, not to mention the resource question.

We are lacking apparently in some of the most fundamental things. If we can't protect our national security, if we can't do something with our vast resources to protect our borders a little better, in terms of espionage, drugs, what-not, then what can we do?

So we are fiddling around and throwing money in all these different directions for things that are not remotely connected with fundamental responsibilities of government, while at the same time we are not coming close, apparently, to doing our job with regard to those basic responsibilities. So maybe we can work together and do some good on this.

Thank you very much for being here. The record will remain open for 5 days after the conclusion of the hearing. We are adjourned.

[Whereupon, at 11:47 a.m., the Committee was adjourned.]

S. 1214—THE FEDERALISM ACCOUNTABILITY ACT OF 1999

WEDNESDAY, JULY 14, 1999

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 3 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Fred Thompson, Chairman of the Committee, presiding.

Present: Senators Thompson, Roth, Voinovich, and Levin.

OPENING STATEMENT OF CHAIRMAN THOMPSON

Chairman THOMPSON. I think we need to go ahead and get started because we don't know exactly what the vote situation is going to be, other than we do know we will have some votes as we go along. But we will try to run continuously as best we can.

We are considering a bill today that really goes to the basics of our Federal system. It has to do with the kind of government we have in terms of separation of powers, checks and balances. We have, as in many of our areas, an inherent and planned conflict in that we sometimes have to balance the considerations of the Supremacy Clause on the one hand with principles of federalism and separation of powers and the Tenth Amendment on the other hand. And the courts oftentimes have to deal with that balance, keeping in mind that if Congress so chooses, it can oftentimes preempt a field under the Supremacy Clause. And that is what we are dealing with here today, basically, is the question of preemption.

If under the Supremacy Clause Congress decides affirmatively and clearly to preempt, there doesn't seem to be much of a problem with that. Where we get into confusion and problems oftentimes is when we get into the field of implied preemption where Congress passes a law, doesn't address the issue of preemption at all, probably is the furthest thing removed from most Members' minds as they vote for a particular piece of legislation. And, lo and behold, after a period of time, lawsuits start coming down the pike and courts are left to try to determine what Congress' congressional intent was. And they come up with all kinds of elaborate theories to determine what Congress' congressional intent was when there probably wasn't any congressional intent on a lot of the things that they have to come up with.

So, basically, the question becomes: If it is a question of Congress's congressional intent as to whether or not Congress meant to preempt a certain area, who is best to express that intent—Congress or the courts?

A lot of us feel like that if it is a matter of congressional intent, we would be better served if Congress was required to face up to that question and deal with it. And that is basically what the Federalism Accountability Act is. I think the act is well named because it has to do with accountability. It doesn't have to do with making those policy decisions as to whether or not a particular area ought to be preempted. I happen to think that we have gone much too far in terms of preemption. Federalism has been one of the things that I have been concerned about for a long time, or the lack of federalism. Everybody gives lip service to it. Everybody says they want it. We have Executive Orders, we pass bills acknowledging its importance, and nobody pays any attention to it.

But that is kind of beside the point to a certain extent with regard to this act. All this act says is, look, Congress, if you are going to do it, face up to it, deal with it, and state that that is what you are doing. In other words, don't pass the political buck to some unelected branch of government who, years after the fact, tries to read your mind on something where there is not really any legislative history on it. And the bill would also require agencies to consider for the first time, as they are supposed to do now and they don't do—and I am going to ask Mr. Spotila here in a few minutes why that is the case, but making agencies consider these issues as they are making their rules.

So that is what this is about, consideration of this piece of legislation which is S. 1214, which addresses the problem essentially of the implied preemption situation that we have that seems to be growing all the time.

I don't have any up-to-date figures, but I know in the 1960's preemption cases were taking up about 2 percent of the Supreme Court's docket. In the 1980's, they were taking up about 9 percent of the Supreme Court's docket. And we are going to get more recent figures, and I dare say it is higher than 9 percent now, all having to do with or largely having to do with reading Congress' mind.

So it just gets basically to whether you believe in democracy or not, doesn't it, Mr. Spotila? So, with that, any statements you have to make? Before you proceed, we will include Senator Levin's and Senator's Voinovich's statements in the record at this point.

[The prepared statements of Senators Levin and Voinovich follows:]

PREPARED OPENING STATEMENT OF SENATOR LEVIN

Mr. Chairman, I am pleased to be a cosponsor of the Federalism Accountability Act, and I am also pleased that the Committee is beginning its consideration of this legislation today. The bill includes a provision which I introduced in 1991 to create a presumption of no preemption in Federal legislation unless Congress explicitly states its intent to preempt or unless there exists a direct conflict between Federal law and a State or local law which cannot be reconciled. Enactment of this provision would close the back door of implied Federal preemption.

Over the past years, State and local officials have become increasingly concerned with the number of instances in which State and local laws have been preempted by Federal law—not because Congress has done so explicitly, but because the courts have found such preemption implied in the law. Since 1789, Congress has enacted approximately 350 laws specifically preempting State and local authority. Half of these laws have been enacted in the last 20 years. These figures, however, do not touch upon the extensive Federal preemption of State and local authority which has occurred as a result of judicial interpretation of congressional intent, when Congress' intention to preempt has not been explicitly stated in law.

Article VI of the Constitution, the supremacy clause, states that Federal laws made pursuant to the Constitution "shall be the supreme law of the land." In its most basic sense, this clause means that a State law is negated or preempted when it is in conflict with a constitutionally enacted Federal law. A significant body of case law has been developed to arrive at standards by which to judge whether or not Congress intended to preempt State or local authority—standards which are subjective and have not resulted in a consistent and predictable doctrine in resolving preemption questions. The presumption created by this bill will mean that silence by Congress on the subject of preemption will mean no preemption. Silence on preemption will not be an invitation for the courts to try to glean what Congress intended or what policy should be adopted. If the law doesn't address preemption and there is no direct conflict with State or local law, then this bill says there should be no judicial determination in favor of preemption.

The bill also contains a requirement that agencies notify and consult with State and local governments and their representative organizations during the development of rules, and publish proposed and final federalism assessments along with proposed and final rules. There is already an Executive Order, 12612 that requires similar attention by the agencies to federalism concerns. But GAO has informed us that there is little, in fact virtually no, compliance with that Executive Order. Out of 11,414 rules issued between April 1996 and December 1998, only five rule publications contained a federalism assessment. I also asked GAO to find out how many major rules involved consultation with State and local governments, setting aside the issue of whether or not a federalism assessment was done. GAO reported to me, based on a quick review of the 117 major rules issued between April 1996 and December 1998, that 96 of those rules did not mention intergovernmental consultation despite the fact that 32 of those 96 rules had a federalism impact. In fact 15 of the 32 rules said they were going to preempt State law.

Common sense dictates that State and local governments should be notified and consulted before the Federal Government regulates in a way that weakens or jeopardizes the work of State and local governments. Both past and present administrations have recognized the value of having Federal agencies consult with State and local governments. This bill would make sure that happens; it would ensure that Executive Branch agencies engage in such consultation with State and local governments and publish with the rules assessments of the impacts of such rules on State and local governments.

I am pleased that this legislation has received bipartisan support, and I look forward to working with my colleagues on the Committee to resolve any issues they may have with this legislation. We have a good group of witnesses today, and I look forward to hearing their testimony as well.

PREPARED OPENING STATEMENT OF SENATOR VOINOVICH

Mr. Chairman, I want to commend you for holding this hearing on S. 1214, the Federalism Accountability Act. I am very proud to have cosponsored this bill with you and Senator Levin, I think it is thoughtful legislation that deals responsibly with Federal preemption. It's an issue that I have been concerned about throughout my years of government service.

In fact, the Federalism Accountability Act exemplifies one of the reasons why I wanted to come to the U.S. Senate after having served over 30 years in State and local government as a county commissioner, State representative, a mayor, and a governor. I know first hand how important it is to protect the authority of States and localities to ably serve their citizens without undue interference from Washington. I wanted to work in support of this fundamental principal of Federalism "from the inside." After pursuing it on the outside as President of the National League of Cities and as Chairman of the National Governors' Association, I am happy to say that months of work with my colleagues has resulted in this bipartisan, common-sense bill that we are discussing today.

Mr. Chairman, one principle that we must get across is the States are not agents of the Federal Government. the Constitution and the Tenth Amendment recognized the unique and sovereign role that the States play in our democracy and it is a role that we must maintain. There has been a great deal of progress in recent years in restoring this balance between the States and the Federal Government, and I think we can all be proud of that. The Unfunded Mandates Reform Act of 1995, the Safe Drinking Water Act Amendments of 1996, Medicaid and welfare reform, and the recently enacted "Ed Flex" and tobacco anti-recoupment measures are all examples where the effectiveness of States and localities have won out over Washington bureaucracy.

Yet despite these welcome victories, the war over Federalism is not won. There is an excellent article to this effect called "The Dual Personality of Federalism," written by Carl Tubbesing, which appeared in the April 1998 issue of *State Legislatures* magazine, and I certainly recommend that my colleagues read this article if they have not already done so.

The article notes that for all the progress made in devolution, flexibility, and more responsibility for the States, there are growing dangers in increased Federal preemption and the centralization of policymaking in Washington. Frankly, I see it every week as I vote on legislation in the Senate, whether it be the Juvenile Justice Bill or this week's debate on the Patients' Bill of Rights.

When the Federal Government preempts State and local laws, it can erode the ability of State and local governments to protect consumers, promote economic development, and develop the revenue streams that fund education, public safety, infrastructure, and other vital services. The current Federal moratorium on all State and local taxes on Internet commerce—taking away a possible revenue source from a governor if he or she so chooses—is just one striking example that could have a devastating effect on the ability of States and localities to serve their citizens.

The danger of this growing trend toward Federal preemption is the reason the Federalism Accountability Act is so important. The legislation makes Congress and Federal agencies clear and accountable when enacting laws and rules that preempt State and local authority. It also directs the courts to err on the side of State sovereignty when interpreting vague Federal rules and statutes where the intent to preempt State authority is unclear.

I am particularly gratified that this legislation addresses a misinterpretation of the Unfunded Mandates Reform Act as it applies to large entitlement programs. The Federalism Accountability Act clarifies that major new requirements imposed on States under entitlement authority are to be scored by the Congressional Budget Office as unfunded mandates. It also requires that where Congress has capped the Federal share of an entitlement program, the accompanying committee and CBO reports must analyze whether the legislation includes new flexibility or whether there is existing flexibility to offset additional costs incurred by the States. This important "fix" to the Unfunded Mandates law is long overdue and I am pleased it is included in our federalism bill.

Finally, I would like to join the Chairman in welcoming our witnesses here this afternoon, particularly my good friend Governor Tom Carper, who is chair of the National Governors' Association. It is truly amazing how much can get done when legislation is introduced on a bipartisan basis. Having, myself, served in his current capacity, I appreciate the importance that this legislation means to the NGA for him to appear here to present his views. I appreciate the great relationship we continue to have with the National Governors' Association and other State and local government associations. We would not be where we are today without their help.

Thank you, Mr. Chairman.

TESTIMONY OF HON. JOHN T. SPOTILA,[1] ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. SPOTILA. Good afternoon, Mr. Chairman. Thank you for inviting me to appear before you today. The last time I was here, I was seeking your support for my confirmation. I appreciate your help and all the courtesies you extended.

Chairman THOMPSON. Should have had this hearing first. [Laughter.]

Mr. SPOTILA. I do recall some questions on this even then. But I do appreciate all your help and courtesies you extended to me in the confirmation process, and I do look forward to working closely with you and your staff in the months to come.

At the outset, on behalf of the President, I want to emphasize our commitment to the principles of federalism and our respect for the Tenth Amendment to the Constitution. And, Mr. Chairman, as you rightly have pointed out, the National Government has limited

[1] The prepared statement of Mr. Spotila appears in the Appendix on page 291.

powers and, generally, government closest to the people works best. President Clinton, a former Governor, has actively encouraged intergovernmental consultation in his issuance of Executive Orders 12866 and 12875 and his support for and signing of the Unfunded Mandates Reform Act.

You have asked me to discuss S. 1214, the Federalism Accountability Act of 1999. This bill seeks to promote the integrity and effectiveness of our Federal system of government. It clearly represents a serious effort to guide relations between the Federal Government and State and local government. We respect and support that effort. We do have concerns, however, that S. 1214 could have unintended consequences. These may include burdening agency efforts to protect safety, health, and the environment by imposing new administrative requirements and by encouraging additional litigation. The administration believes that these aspects depart from the approach adopted in the Unfunded Mandates Reform Act, which it supported and is implementing. We believe that S. 1214 needs some revision if it is to accomplish its goal effectively. We would welcome the opportunity to work with you and your staff in this regard.

Today the Department of Justice will be discussing the administration's concerns with Section 6 of the act, "Rules of Construction Relating to Preemption." My testimony will focus on views on Section 7, "Agency Federalism Assessments." We do have some other drafting comments that we would like to share with you and your staff at a later point, but they are not part of my testimony today.

Our primary concerns with Section 7 revolve around the interaction between its creation of new rulemaking requirements and the potential for harmful litigation arising from them. Section 7(a) would require each rulemaking agency to designate a special federalism officer to serve as a liaison to State and local officials and their designated representatives. Section 7(b) would require each agency, early in the process of developing a rule, to "consult with, and provide an opportunity for meaningful participation" by public officials of potentially affected governments. Section 7(c) would require agencies, when publishing any proposed, interim final, or final rule which the federalism official identified as having a federalism impact, to include in the *Federal Register* a formal federalism assessment. Each of these federalism assessments would involve four mandatory components: Identifying "the extent to which the rule preempts State or local government law," analyzing the extent to which the rule regulates "in an area of traditional State authority" and the degree "to which State or local authority will be maintained," describing the measures the agency took "to minimize the impact on State and local governments," and describing the extent of the agency's prior consultations with public officials, the nature of their concerns, and "the extent to which those concerns have been met."

These requirements may not be unreasonable in themselves. As now written, however, S. 1214 raises the risk that agencies could face litigation on each subcomponent of these requirements. The resultant need to document formally each and every aspect of an agency's compliance with each subcomponent could involve a significant new administrative burden. This is particularly true for

agencies who are trying to implement laws and protect public health, safety, and the environment with limited resources. Even if an agency has acted in good faith, litigation can cause delays and drain scarce resources. To avoid such excessive litigation, the administration feels that S. 1214 should include a statutory bar to judicial review of agency compliance with its provisions.

There are practical implications in this regard. Currently, agencies reach out to State, local, and tribal governments and their representatives on a regular basis to hear their concerns and discuss important rulemakings. These discussions typically proceed in a spirit of intergovernmental partnership, often informally, after reasonable efforts to reach those most likely to be interested. Thus, as a general matter, we believe agencies already carry out consultations as envisioned in Section 7 and do so in a meaningful way.

Our concern here revolves around increasing the potential for litigation. If we make these collegial, informal discussions subject to the possibility of judicial review, it would change the whole dynamic. Rather than discussing matters openly in a spirit of partnership, some agencies could resort to checklists—building up a record that proves that each step has been carried out. Instead of working to improve their rules, agencies might shift their focus to improving their litigation position.

This will divert scarce resources. Agencies would feel compelled to prove that each step has been carried out fully. They would create a prerulemaking record as formal and objectively documented as their counsel deems necessary to withstand a court challenge. It is not at all clear that this will lead to better rules, despite the good intentions embodied in Section 7.

How might this play out? Here is an example: Section 7 directs each agency to "provide an opportunity for meaningful participation by public officials of governments that may potentially be affected." We agree that agencies should do that. But allowing judicial review of agency compliance with this provision would permit potential litigants to ask a Federal judge to decide a wide variety of new issues. How much notice is legally adequate to "provide an opportunity"? How much outreach efforts does an agency have to make to seek "meaningful participation"? If an agency conducts extensive consultations with some of the Big 7, can others of the Big 7 litigate their failure to be included? What about individual State or local governments that do not agree with positions taken by the Big 7? Do they each need to be invited to participate?

The agencies would have to consider, plan for, and determine how to resolve questions like these. This would take time. It also might keep them from other important tasks, like paperwork reduction initiatives, the review and revision of outdated and burdensome existing rules, and the conversion of rules into plain language.

For that matter, each agency would have to do more than just ensure that all of those who were supposed to be notified and consulted were satisfied with the agency's compliance with Section 7. Others with an interest in the rulemaking—including various special interests—could potentially challenge the rulemaking because they were not satisfied with that compliance. They might even do so just to hamstring the agency and slow down its regulatory ef-

forts. Agencies would have an even broader group to consider when designing a consultation effort.

We all know what road is paved with good intentions. While we respect the careful thought and sincere concern underlying S. 1214, we believe that it requires some changes to avoid unintended, adverse consequences. We would be pleased to work with you and your staff on these issues.

Thank you for the opportunity to appear before you today, and I would be happy to answer any questions you may have.

Chairman THOMPSON. Thank you very much. Mr. Moss.

TESTIMONY OF RANDOLPH D. MOSS,[1] ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. MOSS. Mr. Chairman, Members of the Committee, I am honored to be here today to testify regarding S. 1214, the Federalism Accountability Act of 1999. As Mr. Spotila has indicated, my remarks will focus on Section 6, which would establish rules of construction relating to statutory and regulatory preemption of State law and, more broadly, rules of construction relating to any Federal law touching upon the authority of the States.

Section 6(a) and 6(b) would significantly alter the rules under which courts determine the preemptive effect of Federal statutes and regulations. In our view, sweeping reform of this nature would be warranted only if Congress were convinced that existing preemption doctrine systematically operates to frustrate congressional intent and that the new rules of construction would produce better results.

Section 6(c) would operate even more broadly than Section 6(a) and 6(b). It would require that any ambiguity in any Federal law, whether pertaining to preemption or to any other subject, be construed in favor of preserving the authority of the States and the people. Section 6(c) threatens to frustrate congressional intent wherever Federal law implicates the allocation of power between Federal and State governments.

First, I would like to explain our view that Section 6(a) and 6(b) would fundamentally alter long-established preemption doctrine in ways that may create significant new problems. It should only be adopted if necessary to correct equally fundamental misinterpretations of congressional intent by courts and administrative agencies.

Federal statutes may preempt State law in either express terms or implicitly. In either case, congressional intent is, of course, the touchstone of preemption analysis. Thus, implied preemption requires clear evidence of congressional intent to preempt, such as the establishment of Federal requirements that conflict with State law or that occupy an entire field.

Further, the courts require a heightened showing of intent to preempt in areas of traditional State primacy. The Supreme Court has stated that, ''[w]hen Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Con-

[1] The prepared statement of Mr. Moss appears in the Appendix on page 296.

gress.'" Thus, current Supreme Court doctrine already reflects considerable sensitivity to federalism concerns.

Section 6(a) would, nevertheless, alter existing law. No Federal statute enacted after this provision took effect would preempt State law unless the statute contained an express statement of Congress' intent to preempt or there was a "direct conflict" between the Federal statute and State law so that the two could not "be reconciled or consistently stand together." This change would appear to abolish the doctrine of field preemption and impose significant new limits on conflict preemption.

State law that prevented the achievement of purposes of the Federal statute could stand so long as there was no direct and irreconcilable conflict between the two.

The findings section of S. 1214 states that this change is motivated by Federal court rulings that have applied current preemption doctrine to produce results "contrary to or beyond the intent of Congress." It is not clear, however, which applications of existing preemption doctrine are viewed as having misinterpreted the intent of Congress. Before altering such broad-reaching and fundamental rules of law, rules dating back to the early days of the Republic, it is essential to consider whether some less drastic action might redress the problem.

Section 6(a) would be likely to increase congressional reliance on express preemption provisions. We are concerned that this would raise problems of its own. Detailed express preemption provisions may be prone to overinclusiveness, displacing State law where such displacement is not truly necessary, and underinclusiveness, undermining the effectiveness of Federal law by failing to displace antithetical State law.

Some of the harshest criticism of Federal preemption has focused on the operation of express statutory provisions contained in such legislation. In addition, implementation of Section 6(a), as well as the other rules of construction contained in Section 6, would generate disputes as to whether subsequent congressional action implicitly intended to exempt particular statutes from these rules of construction.

Section 6(b)'s proposed changes to current regulatory preemption doctrine raise similar and additional concerns. The Supreme Court has permitted the issuance of preemptive regulations under broad grants of rulemaking authority where preemptive regulations represent a reasonable accommodation of conflicting policies that Congress left to the rulemaking agencies to reconcile.

Section 6(b) would alter the Supreme Court's approach. A Federal rule issued after the effective date of the Federalism Accountability Act could preempt State laws in only two circumstances: First, if regulatory preemption was authorized by statute and the regulation was accompanied by a statement in the *Federal Register* explicitly stating that such preemption was intended; and, second, if the regulation directly conflicted with State law.

Unlike Section 6(a), which applies only to newly enacted statutes, Section 6(b) would arguably apply to the implementation of many existing statutes. If this interpretation were to prevail—if this were the interpretation that was intended, existing rulemaking authority in a great many areas would be constricted, even

if the statutory source of rulemaking authority remained unchanged. Enactment of Section 6(b) in its current form would engender significant confusion. Uncertainty and the threat of litigation could be especially serious for agencies that are called upon to update and revise complex regulations under longstanding statutes that lack specific and express authorizations to issue preemptive rules.

At a minimum, Section 6(b) should be revised to clarify that agencies that now possess authority to issue preemptive regulations under their existing statutes and case law may continue to do so and that Congress does not need to revisit the dozens of statutes that have been on the books for decades to consider in each and every instance whether the agency should continue to have that authority.

Under Section 6(c), any ambiguity in S. 1214 or "in any other law of the United States"—predating or postdating the Federalism Accountability Act—would "be construed in favor of preserving the authority of the States and the people." This provision would apply to any ambiguity in any Federal law, whether pertaining to preemption or to any other subject. The implications of an instruction of this sweeping scope are difficult to assess, although the potential for far-reaching and unanticipated consequences is troubling.

It is unclear, for example, how Section 6(c) would apply to statutory and regulatory language that, although ambiguous on its face, has been clarified by case law or administrative interpretation predating the enactment of Section 6(c). Special difficulties would arise in the interpretation of Federal laws that limit State authority in ways that arguably enhance the authority of the people. Thus, one wouldn't know which section of Section 6(c) to rely upon. Due to its breadth and generality, Section 6(c) would create a risk that unintentional ambiguities in Federal statutes and regulations, with only tenuous connections to the balance between Federal and State power, could be exploited in unforeseen ways to frustrate the intentions of Congress and rulemaking agencies.

Mr. Chairman, thank you for the opportunity to share these observations, and like Mr. Spotila, I would be happy to answer any questions.

Chairman THOMPSON. Thank you very much. I would be remiss if I didn't acknowledge my appreciation of the strong support by the State and local governments, as well as many of my colleagues on both sides of the aisle. Senator Voinovich certainly has been a leader in this effort, and we are very pleased that, with his experience, he is coming on this Committee and leading the effort in this respect, and also Senators Levin, Roth, and Cochran on this Committee for their valuable support and assistance in developing this legislation.

I appreciate both of you being here today, and you have had some discussions with our staff, and I think it has been in the spirit of cooperation and seeing whether or not we couldn't come up with something that would serve our purposes without creating additional problems. But I sit here and listen, and I am struck by—I have never seen a place that is so intent on passing laws and regulations and is so scared to death of litigation. Congress passes law after law after law, but we don't want any litigation over it. And

rules after rules after rules after rules are passed, but we don't want any litigation.

What that basically means is that we don't want anybody challenging what we are doing, and, therefore, we don't want judicial review and we don't want to have to answer to any of that. But that is really not our system, and we have seen in this particular area that if there are no sanctions connected with these rules, with these laws, then they are not carried out.

It seems that we develop—we come up with these broad policies and broad statements like the values and benefits of federalism and consultation and all of that, and we all agree on that and say that we should do that. But we really don't want any mechanism that is going to in any way require us to do that. Just trust us, we will do the right thing. But we have seen in this area where we are not doing the right thing.

Mr. Spotila, you ought to know better than anybody with regard to the Executive Order on federalism that it has been routinely ignored. We make these statements. The President makes these statements. He puts it in an Executive Order, and the President's own Executive Order—of course, this is a carryover but it is still in effect. And your shop is the one that is supposed to be seeing that these things are carried out and the Executive Order—over 11,400 rules. There were five federalism assessments. How can you come up here and say, we don't want any judicial review of all this, we agree with you and we are going to do it, and we are doing it, when you are obviously not?

Now, you have been there a short period of time, and so you are going to get a little leeway. I emphasize the word "little." But tell me about that. How can you reconcile the fact that if we don't have some kind of judicial review for this thing that we all say that we love and we want and we want to do, that we really will carry it out when it stands in the way of some regulator or someone else from doing what he wants to do unfettered?

Mr. SPOTILA. Let me say a couple of things. Let me begin by saying that I am a firm believer that Executive Orders should be complied with and certainly laws should be complied with. There is no question about that. In instances where there is a need for better enforcement, then I think that is something that we should pay attention to. So I do agree clearly with that.

In the instance of Executive Order 12612, which was signed in 1987 originally by President Reagan and carried forward by President Bush——

Chairman THOMPSON. And carried forward by President Clinton.

Mr. SPOTILA. And carried forward by President Clinton until—we know that there was an effort and a new Executive Order which was then suspended and so forth. I think that the truth is probably somewhere a little in between. By that I mean I don't think that this order has been well enforced probably by any of those three administrations from what I have been able to gather and from what I saw largely as an agency general counsel.

I think that it was enforced more—it was complied with more by agencies than the GAO report probably gives credit. I think that in some instances with——

Chairman THOMPSON. You mean 10,000 out of 11,000 instead of five or what?

Mr. SPOTILA. The GAO referred to the number of times that the preamble to a rule cited the Executive Order and used that as a guide, which is probably a pretty good indicator. I certainly would not suggest to you that there was widespread compliance with this order. I think, though, that there was some attention given to federalism implications in the agencies. There has been and continues to be.

In 1993, when President Clinton issued Executive Order 12875, that called for an emphasis on consultation, and which was followed by the Unfunded Mandates Reform Act, the agencies got a clear message that the White House, that the President, wanted them to give a lot more attention to consulting and to be particularly sensitive to the problems of unfunded mandates. Neither of those was directed at preemption, but both of those were focused on items that are important and that relate to federalism and that we care about.

I think that the agencies have given more attention to this. Our reports identify agency action that were not dealt with by the GAO in its report and that tell a story of more compliance than GAO would indicate.

None of that, though, is to say that that is an ideal situation or that——

Chairman THOMPSON. Well, while we are on the subject—the proof is in the pudding in terms of the extent of compliance. And I am looking at the statement of Professor Gellhorn who will be testifying here in a few minutes. But he says, "One empirical survey undertaken for the American Bar Association's Section of Administrative Law and Regulatory Practice showed that requirements not pressed by the Office of Information and Regulatory Analysis"—that is your office—"the office with responsibility in OMB for implementing the regulatory Executive Orders, or subject to judicial review, have been ignored rather than implemented by the agencies."

"Another review of agency rules between 1996 and 1998 by GAO shows that agencies generally have paid only lip service to the Executive Order on federalism. In fact, EPA did not mention the order in any of the 1,900 rules issued in this period, and only 5 of over 11,414 agency rules issued during these 2 years indicated that a federalism assessment had been done."

So, we are past the point of debate, really, I think, in terms of whether or not this has been given any credence, any lip service to it, no priority by your office, clearly. Do you have a review checklist that lists the things that you check these agencies on?

Mr. SPOTILA. When rules are considered, this is one of the elements that OIRA staff——

Chairman THOMPSON. This should not be a partisan matter. You brought it up. But I have to say that President Reagan raised this issue in his Inaugural address, issued this Executive Order, and his OMB Director then sent a directive to the agencies reiterating the importance of the order. President Bush personally sent a directive to the agencies to the same effect. But the real proof is in

the pudding here in terms of these statistics. It just gets back to how much importance you place on this.

Now, when you were over at the SBA, the matter of the Regulatory Flexibility Act came up, and that requires agencies to determine if there is a significant impact on certain small entities, and if there is, they are supposed to do an analysis and take steps to alleviate all of that. And when you were at SBA, you supported, along with the Vice President, giving judicial review.

Now, is the impact on these small entities or these small businesses important, more important than impacts on States?

Mr. SPOTILA. I was a supporter and am a supporter——

Chairman THOMPSON. Of local governments?

Mr. SPOTILA. Of judicial review in the context of the Regulatory Flexibility Act. Candidly, I think that it has been constructive to have it. The agencies take their requirements more seriously because of it.

Having said that, a lot of attention was given to how to focus that judicial review provision narrowly to accomplish better compliance without opening up an enormous amount of excessive litigation. And those are some of the same concerns that I am referring to today. I think that we need——

Chairman THOMPSON. So you think we could focus ours in a way that would serve the same salutary purposes that——

Mr. SPOTILA. Well, the short answer to that is yes. As a little longer answer, the President has already signed the Unfunded Mandates Reform Act, which has a judicial review provision. He has indicated he would sign S. 746, which also has a targeted approach. So I think it would be a fair assumption to say that a targeted approach would be something we could—we ought to be able to agree on.

But if we are too indiscriminate, then there is a real risk of excessive litigation, and I do not think that serves the public interest.

Chairman THOMPSON. Mr. Moss, moving to Section 6, the rule of construction, you talk about the fact that this alters long-established doctrines. But the long-established doctrines that it alters are judicial doctrines which are trying to interpret our intent. Right?

Mr. MOSS. Correct.

Chairman THOMPSON. Don't you think we have a dog in that fight? I mean, we ought to be able to state what our intent is. We should be willing to do that, shouldn't we?

Mr. MOSS. I absolutely believe that you have a very big dog in that.

Chairman THOMPSON. We won't say what kind, but just—— [Laughter.]

Mr. MOSS. A very positive dog in that.

What I would say, though, is that it is unclear to me whether moving to a system in which you have what I would call a framework rule that applies to future enactments, which provides only for express preemption or direct conflict preemption, is one that, in fact, in the long run will best capture congressional intent. Some of the most contested, difficult cases in the Supreme Court—you mentioned the increase in cases dealing with preemption. Some of the really big Supreme Court cases recently in preemption have

been figuring out what express preemption provisions mean. The *Cippolone* case dealing with the cigarette warnings, the *Medtronics* case dealing with the medical device amendments, some of the most contested issues have dealt with that.

In addition, some of the most heated, I think, attacks on preemption have been in the area of express preemption, attacks on the broad express preemption provision in ERISA.

Chairman THOMPSON. But those are policy debates.

Mr. MOSS. They are policy debates, but I think that there are still questions that go to whether——

Chairman THOMPSON. So you are basically saying it is impossible for us to express our intent.

Mr. MOSS. No, not at all. I believe——

Chairman THOMPSON. That it is very difficult.

Mr. MOSS. I believe that Congress should do so. I suspect that, although perhaps more difficult in the long run, it may be best done on a case-by-case basis rather than in a piece of framework legislation like that. I can give you an example of what I mean by that.

Chairman THOMPSON. Well, you can still—you can do it on a case-by-case basis the other way. If we are concerned—and some of the witnesses that come after you will have some instances, and which I believe to be the case, where there are more and more cases where you have these confusing doctrines butting heads with each other and inconsistencies and courts coming up with these interpretations that are inconsistent with one another. So if we conclude that and we decide that we want to lay down a framework and say unless we say otherwise, here is the rule.

Mr. MOSS. Right.

Chairman THOMPSON. That doesn't keep us from saying otherwise. In a given case, we can wipe the whole thing out if we choose to in a given case. The question is: What is the general rule going to be when we are silent on the issue? That is the issue here, isn't it?

Mr. MOSS. I believe that is correct, although I think that it is even the case that where you are silent on the issue in the subsequent enactment, there are going to be debates, and the courts in the end are going to have to figure out what congressional intent is.

To give you an example, another type of framework—there is not a great deal of framework legislation of this type, but another piece of framework legislation of this type dates back, I believe, to 1871, and it is the Dictionary Act. And it says unless Congress says otherwise, this is what these terms are going to mean.

In a case called Monel, Justice Brennan writing for the Supreme Court looked to the definition of the word "person" in the Dictionary Act. He said the word "person" in the Dictionary Act includes a body politic, and, therefore, it must include municipalities. And, therefore, one can bring an action against a municipality under Section 1983.

In a subsequent case called *Quern v. Jordan,* Justice Rehnquist was writing for the majority, and the question was whether that same analysis would apply to States. And Justice Rehnquist said the Dictionary Act is just too thin a reed to rely upon, to rely on

that definition in an 1871 statute to decide whether States should be subject to an action under Section 1983. There was nothing in the 1983 statute itself which addressed that. But the Court still had to wrestle with the question of what congressional intent was and whether implicitly Congress reached a different conclusion.

Chairman THOMPSON. That wasn't a preemption case, was it?

Mr. MOSS. It was not a preemption case.

Chairman THOMPSON. There can always be an issue as to what a particular word means, especially over a long period of time. It sounds like a significant length of time past that. I am not saying that it would never produce any litigation, but this litigation you are concerned about needs to be juxtaposed to the litigation that we have. I mean, we are just replete with litigation now, taking wild guesses as to what congressional intent is. This isn't a panacea that is going to foreclose every possible issue. And we will, if we decide to preempt, state so in clear, explicit language, hopefully. But I don't think we ought to get too hung up on throwing our hands up and saying, we are unable to express our intent. If that is the case, then we are in worse shape than I thought.

Mr. MOSS. I entirely agree that Congress should as clearly as possible express its intent. But let me just mention two other cases that come to mind in defense of implied preemption. Few people realize that perhaps one of the great decisions ever decided was an implied preemption case, and that is *Gibbons v. Ogden*. That is the case decided by Chief Justice Marshall in 1824 that opened up our markets to interstate commerce. And I think people generally studied the case in law school and think of the case in law school as a case which establishes the broad power of Congress to regulate interstate commerce. But the ultimate holding in the case, Chief Justice Marshall comes down and says I don't need to decide in this case whether the power to regulate interstate commerce is exclusively for the Federal Government and whether the States have a role here.

The State of New York imposed a monopoly on steamboat traffic between New York and New Jersey, and Chief Justice Marshall said there is a Federal statute that provides for licensing of ships that are involved in the coastal trade. And I think an implication of that must be that Congress would have intended not to allow States to impose these sorts of monopolies and limitations. And, therefore, as a matter of implied preemption, Chief Justice Marshall concluded that the markets had to be opened up and economic development began in earnest, and the case was widely received as one of the great decisions at the time it came down, even by those who were strong supporters of States' rights.

Chairman THOMPSON. So what is your point?

Mr. MOSS. That implied preemption at times is extremely important and has a long history dating back to the early——

Chairman THOMPSON. It is important—I mean, if it carries out the intent of Congress, it is important.

Mr. MOSS. Yes.

Chairman THOMPSON. And if it doesn't, it is important, too. But, I mean, that is the issue. Is a decision such as that carrying out the intent of Congress? And what you have there is a judge having to decide, as the courts often do, what the congressional objectives

are, what the national purposes are. My point is this legislation would void all that.

Mr. MOSS. Let me give just another example, Mr. Chairman——

Chairman THOMPSON. I will tell you what. Give it to Senator Voinovich because I have taken too much time.

Mr. Moss. As have I, and I appreciate your indulgence.

Chairman THOMPSON. We will have time.

Senator VOINOVICH. I would just like to say that I appreciate the thorough evaluation that you have given of the legislation, and I for one will take it into consideration. And if we think that any of your points are well taken, we will try to incorporate them into the legislation.

I happen to be one that feels that the more clarity we have in this area, the better off we are all going to be. I think the more consultation that we have with each other, the better off we are going to be. And that is really the kind of environment that we are trying to create through this legislation.

Chairman THOMPSON. Thank you very much. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

I was intrigued by your last statement about the value of implied preemption. Just a few minutes before that, you said it is desirable that Congress be as clear as possible as to whether or not it intends to preempt. Those are inconsistent statements.

Mr. MOSS. I don't believe so, Senator Levin. For example, one could imagine a circumstance in which Congress thinks as carefully as any group of human beings could possibly consider an issue. They think about every angle on it, and they draft a Federal law to address a problem. Twenty years later, the States for the first time start adopting some new form of regulation in the area that poses an obstacle to the Federal statute. No one in Congress at the time could have been expected to have foreseen this development. The development interferes with achieving Congress' purpose. And under this statute, it is unclear whether the Federal statute would be allowed to achieve its goal. And maybe in those circumstances Congress would then have to go back and re-evaluate the issue.

So I don't think that it is always going to be the case that the rule that says that Congress always must be expressed or there must be a direct conflict will always best achieve congressional intent.

Senator LEVIN. Well, I think you just put your finger on what the answer is, that if something crops up where the Congress now sees it is important to preempt, it can just simply adopt a preemption provision as an amendment to that law that was passed 20 years ago. But to use that as an example of why implied preemption somehow or other is desirable, when you yourself say as a general matter it is important to not do anything by implication, it is important that we express one way or the other, it seems to me in general are inconsistent statements.

Mr. MOSS. Well, I respectfully disagree with that, and one reason I think I disagree is that these categories are not as neat as we would like to think of them. And, in fact, conflict preemption is a form of implied preemption. The two major categories are express preemption where Congress says we are preempting X, Y, and Z, and there is implied, which includes conflict preemption, field pre-

emption, obstacle preemption. And Justice Black very eloquently in a case decided, I believe, in 1941 named *Hines* said that it is extremely difficult to figure out which of these categories something fits into, but in the end the goal is to figure out what Congress intended.

I think that the courts by and large are very respectful of that. They have rules and presumptions against finding preemption where it interferes with an area of traditional State regulation. And if there are areas in which Congress—where the courts have been finding preemption and Congress didn't intend it, I think that is something that obviously needs to be considered in the first instance to figure out whether there are particular areas that need to be fixed.

Senator LEVIN. I think Congress is in a lot better position to determine whether it intends to preempt States than courts are through rules of construction which are incredibly complicated trying to divine what that congressional intent is. It is far better, it seems to me, to know what the congressional intent is, or in the event that it is unknowable or unknown or unspecified, than for Congress to say which way it wants this to go. Do we want to preempt in the absence of an express preemption or a conflict or not? And if we say the presumption is that we do not want to preempt the States from acting, unless we expressly state so or unless there is a direct conflict, it seems to me that is a lot clearer guidance to a court than these rules that have been created over time, and it ought to be welcomed—I would think it would be welcomed by a court.

I will leave that there, but your analogy as to how at times the absence of any clarity in law and the courts trying to figure out Congressional intent has led to a good decision reminds me a bit of saying, well, President Roosevelt during the 1930's was able to either ignore or evade the Neutrality Act, or whatever it was called, through our Lend-Lease Program; therefore, it is great for Presidents to evade our laws just because we have a good circumstance there. I am all for it. Looking back in history, I am glad the President—I hope I would have been at the time—engaged in the Lend-Lease Program; therefore, I am glad the President evades our laws. But that can't be our general principle because I can come up with an example of where it was good that a President did evade our laws.

So I don't think your—going back to the Marshall case is a particularly good one. Just because you can pull out an example where there was silence and, therefore, a very creative, wonderful Supreme Court Justice was able to reach a great decision is not, it seems to me, a very good argument for a policy of silence being something which leads to good results.

Mr. MOSS. If I can just say one thing quickly, Senator. It was not my intent to suggest that the court should reach out and just come up with good results in cases contrary to what Congress intended but, rather, that I am not convinced, based on my reading of the cases, that a rule that says there must be an express preemption provision is in the long run going to better capture congressional intent. And in my looking at the cases, I see enormous debate and complexity in discerning express preemption provisions, and it is

unclear to me that the courts are getting closer to congressional intent with those than they are in the implied preemption, where they are quite deferential.

Senator LEVIN. You are saying that you don't think a court is given more guidance by an express statement of preemption than it is by silence. That is what you are saying to me. And it seems to me that has palpably just got to be wrong. That goes directly counter to what you earlier said, which is we should express our position on preemption. Do you want us to do it or not?

Now, if you want us to do it—and I do, I think most of us do—then you have to take that position even though it may be not totally conclusive and even though there may be questions, as the Chairman pointed out, that remain for a court to try to figure out.

You can't have it both ways. You either want us to express our intent or you don't. Which do you?

Mr. MOSS. I think it is preferable for Congress to express their intent, and——

Senator LEVIN. Even though there may be some open issues for a court.

Mr. MOSS. Sure. Yes.

Senator LEVIN. I think that is a better position, but it is inconsistent, I am afraid, with a few other directions that you have taken or tried to take this morning.

Mr. MOSS. Well, respectfully, Senator, I don't think——

Senator LEVIN. You don't have to be that respectful. You can just disagree period. [Laughter.]

Mr. MOSS. I think there is a difference when one is dealing with a type of framework legislation like this where in 1999 Congress passes a rule like this that presumably will be on the books for many decades to come and future Congresses will be guided by it, compared to a circumstance where Congress sits down in a particular context and says what is it exactly we want to do here and let's say as clearly as we can what we want to do here, which I think is a very good thing.

Senator LEVIN. Another area I want to go into with you is also an area which the Chairman got into, and that is the failure of apparently three administrations in a row here now to prepare federalism assessments. We had an Executive Order back in 1987 of President Reagan. Now we are going into the seventh year of the Clinton administration. According to the Acting Director of OIRA, that Executive Order basically has never been followed, apparently, through three administrations, if I read this correctly. We know from a test in the last 2 years it has never been followed. Apparently, it wasn't even followed during the administration in which it was issued.

That, it seems to me, presents an awfully good argument for us to incorporate into law the requirement rather than using it as, apparently, I think you do as a reason for why we shouldn't do it because it has never been followed.

Isn't the fact that that Executive Order has been ignored administration after administration reason for why we should act, why we should put its requirements in law, including the federalism assessment, rather than using that as I think it has been used by the administration as a reason not to act?

Mr. MOSS. Let me——

Senator LEVIN. I think I should go to Mr. Spotila. I am sorry. I agree. You are looking over to your right and I will look over to your left.

Mr. SPOTILA. I thought maybe I was going to escape that one.

Senator LEVIN. No.

Mr. SPOTILA. Senator, as I said, right before you came in, I am firmly convinced that Executive Orders should be complied with. They must be complied with, as must laws, with or without judicial review. I don't have direct experience on OMB's relationship with Executive Order 12612, but I have been advised, as you have alluded to, that it appears that for three administrations this was not enforced by OMB. It is unclear whether GAO has captured precisely the amount of agency compliance with the Executive Order, but there seems to be a general sense that there wasn't much compliance, if any.

I think that the efforts in this administration began with Executive Order 12875 on consultation and then the effort to come up with a new Executive Order that would deal with preemption as well as consultation and unfunded mandates last year. That effort recognizes that there is a need for guidance to the agencies and that with clear guidance then we would be in a position to compel the agencies to do what is appropriate.

Having said that, if the Congress determines that it would add value to legislate in this area, then I don't think we object to that concept. It becomes a matter of how to do it and whether we can avoid unintended consequences.

Senator LEVIN. Putting aside the judicial review question just for a minute, do you support, does the administration support a requirement that there be a federalism assessment in law?

Mr. SPOTILA. I think the administration believes that it is not necessary for it to be in law, that it can be dealt with through an Executive Order. I believe that is the administration position. That does not necessarily mean that the administration would not—that the President would not sign such a bill, but it does mean that they feel that an Executive Order can be shaped in an effective way to deal with this issue.

Senator LEVIN. Thank you. If history is any guide here, the Executive Order which has been on the books for 12 years has been ignored, which is one of the problems with Executive Orders, by the way. We face this all the time. I am looking at a former chief executive here, so I am a little bit worried about saying that here. But we find too often that the administrative agencies simply ignore what is in the Executive Order, and they get away with it because it is not in statute. So we face this in a number of areas where we have to put in statute something in order to make sure it gets done. And I think it is very clear from the history of this that this is one such example.

I think maybe I have gone over time, but those are all the questions I have. Thank you, Mr. Chairman.

Chairman THOMPSON. Along those lines, we are right in the middle now, apparently, of your negotiating with State and local government representatives on a new Executive Order. I mean, that

has been up in the air for some time now, hasn't it? Aren't you in the process of negotiating one?

Mr. SPOTILA. The administration is in the process, yes. I have not personally been involved yet in that, but——

Chairman THOMPSON. Who is handling that? Is Ms. Katzen still handling that?

Mr. SPOTILA. She has some involvement in it, yes. She has the advantage of having worked on this issue for some time now and has been one of the people involved.

Chairman THOMPSON. I know she has, and we have got some questions for her, too, when she comes up for confirmation.

Mr. SPOTILA. I know that there is a significant effort to try to reach an understanding, and I think people——

Chairman THOMPSON. Well, the administration tried to repeal or supersede the Executive Order we have been talking about with a new Executive Order, which caused great concern among a lot of the people affected on this federalism issue, and without consulting with State and local representatives, even though the Executive Order would require consultation with State and local representatives. So they weren't even—in the process, they weren't even complying with the Executive Order that they were trying to get done. I mean, how much more evidence do we need for the need to legislate in this area? I don't know what is going to come out of that, but I will guarantee you one thing: If because of everything else that is going on some reluctant acknowledgment is made in some Executive Order about federalism, with this history it doesn't mean a whole lot to me in terms of this legislation.

I am more than willing to work with you on the judicial review. I don't want to bog this thing down. I must say that the elements that have to be complied with by the agencies are of a little different category than in some of the things that we deal with here. We might could use the Regulatory Improvement Act as a model for judicial review. But the requirements here have to do more with assessments and descriptions and analysis under this federalism bill. If it really doesn't go directly to the merits of the rule that is being promulgated, it just has to do with an analysis of the federalism impact and the extent to which you have consulted.

Frankly, if you do want it all, I don't see much grounds for challenging that since it doesn't go to the efficacy of the rule itself. Do you see what I mean? I am not sure how all that cuts, but it does seem like this is a different kind of category of rules, and it shouldn't present a major—or requirements, I should say, in promulgating the rule, and shouldn't present a major problem for us in figuring out some way to require an agency to make a good-faith effort—I mean, not to be able to say, yes, we consulted with everybody when, in fact, they didn't. I mean, there has got to be some remedy for that if something like that happened.

Mr. SPOTILA. Well, we believe that we ought to be able to work with you on this and work something out. As I said in my testimony and as I will repeat again, we share many of the same objectives here, and I think it is a matter of how to work together to get this right.

Chairman THOMPSON. Well, I appreciate that.

Mr. MOSS. Mr. Chairman, not to invite a question on this, but also not to leave any misimpression, I should tell you that I have been present during a number of the discussions with the State and local governments which I regarded as very fruitful.

Chairman THOMPSON. How is it going?

Mr. MOSS. I think we have had a very positive interchange, and we are working very hard, and I think we remain hopeful that we are going to be able to reach——

Chairman THOMPSON. Have you decided, in trying to come up with an order that requires consultation with them, that you ought to consult with them?

Mr. MOSS. Yes, Mr. Chairman.

Chairman THOMPSON. We have gotten over that hurdle.

All right. Is that a vote? [Pause.]

I am going to recess here just very briefly in order to go vote, and we will come right back. I am sorry. I was hoping we would be able to keep going, but it doesn't look like we are going to be able to. So we will recess hopefully just very briefly to have an opportunity to vote.

[Recess.]

Chairman THOMPSON. Let's come back to order here very briefly. Senator Roth has come in, and he has an introduction to make which will allow us to get started on our second panel. So, gentlemen, we want to thank you for being with us, and we will—I don't think we need to ask the whole second panel to come up, but you may go, if you would. Senator Roth will make an introduction to lead off our next panel.

OPENING STATEMENT OF SENATOR ROTH

Senator ROTH. I want to thank the Chairman for his courtesy. Please come up, Governor Carper. For me it is a great pleasure to introduce a distinguished Delawarean to the Committee today. And appearing as a witness for the second panel is Tom Carper. Tom is governor of the State we all affectionately call "the small wonder."

Now, I have known Governor Carper for many years, and we have had the opportunity of working on many issues of great importance to our beautiful State.

Tom has a very distinguished background. He served as Delaware's State treasurer from 1977 to 1983. In 1983, he came to Washington as a Congressman and spent almost a decade in that office before assuming the governorship in 1993.

Currently, the governor serves as chairman of the National Governors' Association, and his background as well as his responsibilities in this new role gives him a unique insight into the topic before our Committee today, the important issue of federalism.

Like many of us here, Governor Carper understands the special role of State government and the need to keep these governments strong and vital. He is such an expert on this area that he agrees with me and supports the Federalism Accountability Act.

So it is a great pleasure to welcome you here today, Governor Carper, and have you before our Committee. We look forward to working with you on this bill as it proceeds.

Governor CARPER. Mr. Chairman, thank you very much. I feel like this is a home game as opposed to an away game, and I am delighted to be here with you. It is great to see George Voinovich who preceded me as chair of the NGA and to see Senator Levin, whose brother I served with in the House on the House Banking Committee for a while.

I just want to say to you and to others on this Committee and the Senate, Democrats and Republicans alike, who have sponsored this particular bill that you are holding a hearing on, many thanks, many thanks.

I would ask permission, Mr. Chairman, if the full text of my statement might be entered into the record, and I would just like to summarize it if I could.

Senator ROTH. That will be fine. We will have to recess because we do have a vote on the floor. And so I am going to recess and go back, and the Chairman will return in just a few minutes.

Governor CARPER. That will give me time to rewrite my testimony. [Laughter.]

Senator ROTH. Again, we welcome you here.

Governor CARPER. Thanks. You are good to be here. I appreciate it, sir.

Senator ROTH. The Committee is in recess.

[Recess.]

Chairman THOMPSON. We will reconvene and turn to our second panel. The first witness will be the Hon. Thomas Carper, governor of Delaware, the chairman of the National Governors' Association, who has been introduced.

He will be followed by the Hon. John Dorso, Majority Leader of North Dakota House of Representatives, who is testifying on behalf of the National Conference of State Legislatures. Majority Leader Dorso testified before our Committee in May on the federalization of crime, and we are pleased to have him again with us.

The final witness on this panel will be the Hon. Alexander Fekete, who is the Mayor of Pembroke Pines, Florida, who is testifying on behalf of the National League of Cities.

Governor, I know you have to leave soon, so I thank you for being with us today, and we would be pleased to hear any statement you have to make.

TESTIMONY OF HON. THOMAS R. CARPER,[1] GOVERNOR, STATE OF DELAWARE, AND CHAIRMAN, NATIONAL GOVERNORS' ASSOCIATION

Governor CARPER. Mr. Chairman, thanks very much. Could I ask that my printed statement be entered into the record?

Chairman THOMPSON. It will be made part of the record.

Governor CARPER. Thanks very much. Thank you for inviting us to come and letting us be here.

This is sort of the second bite out of the apple that the governors have had. Mike Leavitt of Utah was here I think earlier in the year and testified, and we appreciate the second chance. It is just great to be with Senator Voinovich. It is hard to call him Senator. He still thinks like a governor, and we are delighted that he is here.

[1] The prepared statement of Governor Carper appears in the Appendix on page 306.

It is great to be with you. Sometime during my testimony you will hear me speaking, but you will see his lips moving. [Laughter.]

It has been that way for a while, hasn't it, George?

Senator VOINOVICH. Governor, I would like to say thank you for being here today, and I just want to say that there are some wonderful things that have happened in this session of the U.S. Congress because of the wonderful relationships that your organization and the other organizations and the Big 7 have developed with the leadership here in the Senate and in the House. Hopefully, we will keep following through with this legislation.

Governor CARPER. I hope so. I just want to say particularly to you, but to others as well, education flexibility, and your colleague from Tennessee, Bill Frist, was very good in that, tobacco recoupment, all kinds of issues, thank you very much for what you are doing.

I was sitting in the audience when some of the discussion from the last panel got off on the Executive Order that the administration has been working on. Senator Voinovich was then a governor. In fact, we were, I think, in Milwaukee getting ready for a governors meeting when the word came out that the administration was about to issue a new Federal Executive Order on federalism. We got on the phone and called the folks back here in the administration, asked them to back off—he says you haven't consulted with us at all, not the governors organization or any other organization to our knowledge, and we just asked them to back off and give us a chance to sort of revisit the issue. And they have been good about doing that, and we have had a real long conversation. And I think for the most part we have narrowed and eliminated our differences. There is still a difference on a key issue, and that is, I think, the 4(b) preemption. But other than that, I think they have met us halfway, and I am well pleased.

I am pleased to have a chance to come before you today, and I just want to sort of summarize my testimony for about the next 45 minutes. [Laughter.]

Not really.

Chairman THOMPSON. We are used to that.

Governor CARPER. When you had Mike Leavitt here, you had the governor who knows about this stuff. You got me, and I have learned from him and from George Voinovich.

I would like to share with you a couple points. First, is thank you for being our partner. Thank you for regarding us as a full partner, and we are real supportive of this legislation, as you know, and are delighted to see it has bipartisan support. We hope you can come up with something that the President can sign and that we can all benefit from.

If you look at the last decade, most recently education flexibility legislation, what you did on unfunded mandates, what you have done on child care, what you have done on welfare reform and some other areas, you have actually sort of devolved power back to the States. We think that is good, putting the power closer to the people and trying to hold us accountable, and that is the way it ought to be.

While devolution has sort of occupied center stage during the last couple of years, another story has unfolded with a little less fan-

fare, and that is preemption of State and local laws. Sometimes we focus on the administration doing the preempting, but the Congress preempts, too. I used to be a Congressman, was for 10 years. I did my share of preempting. And, in fact, one of my primary antagonists was Senator Levin's brother, Sandy, and we did war on the House Banking Committee. I was trying to preempt some State laws. We were trying to work on—the issue of how long it takes you to get access to your money, your checking accounts, after you deposit a check? We call it clearing times, and I was trying to preempt some State laws. Sandy was trying to stop that or slow it down. In the end, we preempted and I think we came up with a good national policy.

So I sit before you today as one who has done a little preempting, but who sits as governor——

Chairman THOMPSON. A reformed sinner. [Laughter.]

Governor CARPER. Reformed, that is right. What is it? Hate the sin, love the sinner. But there are times when it is appropriate to preempt, and I think what you are trying to do here is to say if there is a Federal law that we pass and if you got a State law over here that is inconsistent, before the Federal law preempts the State law, you have got to say here in Congress we mean to preempt you. And if you don't and we end up in court, then we sort of say to the courts, in that case you cede to the States. You basically yield to the States. And that is pretty much the way we think it ought to work.

Federal preemption of State laws has occurred as a result of not any kind of malicious desire on the part of anybody here in this body or across the Capitol to undermine State sovereignty. There is sometimes the unintended byproduct of other issues, and, unfortunately, that can be the same for States regardless of whether the motives are good or bad. Sometimes we have ended up with State and local authority decision-making reduced. We have seen a little bit of centralization of power here in Washington. Maybe more than is in the interest of our country.

As I said earlier, it is not just the agencies that preempt, but the Congress does as well.

I just learned this in preparing for my testimony. There is a service in the congressional legislative website. It is called Thomas. That is provided, and some of our folks looked it over to see if we could find the preemption in the titles of any bills that are coming before Congress. I am told it came up with 115, which is pretty impressive, 115. I don't know where they came up with the name Thomas.

Chairman THOMPSON. Just 1 day's work sometimes. [Laughter.]

Governor CARPER. I would like to sit here before you today and say I think this situation is going to get better with respect to preemption. My guess is as we go forward and have more international competition and folks are trying to respond quickly to technological developments and people are trying to maximize opportunities that are created by deregulation and businesses seek to streamline legal and regulatory requirements, my guess is we might end up with greater problems with preemption. And I can understand businesses not wanting to contend with a whole myriad of State and local codes with our statutes and our rules that pre-

vent them from being able to respond effectively to changes in the marketplace.

However, just as Federal laws and oversight serve important purposes that include preventing monopolies, raising revenues, and also financing Social Security, we think the State and local laws fulfill a variety of critical functions, too.

State and local taxing authorities provide funds. You know this as well as I do. We do it for education. We do it for the roads that you help us to build, for law enforcement, for health care, and for environmental protection, too. State banking, insurance, and security laws impose capital adequacy requirements and underwriting standards, licensing procedures that safeguard consumer deposits and investments and protect against fraud and against abuse.

We have State utility regulators that are trying to ensure our citizens get high-quality water and electric and sewage and telephone service and they get it at reasonable prices.

The important role of State laws and our regulatory responsibilities shouldn't be forgotten in the midst as we scramble to accommodate businesses and react to the forces of globalization, the forces of technology, and the forces of deregulation. Our States and our citizens, people you represent, too, stand to benefit as much as businesses from the changes that are being made, but not at the cost of continuing Federal preemption of State laws.

I want to thank you for the work that has been done on unfunded mandates, and I know that was done by a previous Congress, previous leadership of the NGA, but we are grateful for it.

The legislation we are discussing here today is actually pretty similar to the unfunded mandates legislation that was enacted about 4 years ago. That legislation has been successful because it provides better information and analysis about unintended consequences of Federal action before they happen. I will say that again: Before they happen instead of after they happen. And your preemption bill is not dissimilar to that. It focuses on, as I understand it, providing information and ensuring consultation prior to action by either the Congress or by any Federal agency taking action with federalism implications.

I am happy to tell you today NGA supports your bill, S. 1214, Mr. Chairman. We urge you to schedule markup as soon as possible, maybe after this testimony is over today, maybe later this week, or maybe next month. But we would like for you to—we would encourage you to move forward with all due diligence.

There are a couple of changes we would like for you to think about making to the bill, and let me just mention them briefly.

First of all, I think in Section 5 the analysis required in Committee or conference reports you might want to consider expanding that a bit. We think it is important for Federal officials to understand the effects of legislative and regulatory preemptions on costs, on economic development, on consumer protection, and State and local enforcement authorities. We would ask you to keep that in mind with respect to Section 5.

Additionally, I think you have got a point of order. I think the unfunded mandates law includes a point of order. I don't believe this bill does, and you may want to consider amending this bill to

provide for a point of order, and I would ask you to keep that in mind.

The other point, I think this deals with Section 6(b), and the rules of construction would apply to all rules promulgated after enactment of this legislation. Let me try to get this straight. I think the way the bill is written it says that you would affect Federal rules promulgated pursuant to legislation enacted previously. So that is a rule or regulation promulgated after the passage of this bill where it could be promulgated with respect to legislation that was previously adopted. And what we would encourage you to consider is amending that subsection so that the rules of construction apply only to Federal rules promulgated pursuant to legislation enacted after S. 1214.

In conclusion, let me just say that the legislation I worked on down here was never perfect. I don't know that this is either. It is good. I don't know that you are going to be finished or we are going to be finished on this front. But I just want to encourage you to continue your efforts and to expand your good work to this threat to federalism, and that is preemption.

We want to urge you to join us as States and as governors in a working partnership involving all of America in our system of government through all of its elected officials, whether we are in State houses or here on Capitol Hill. And I think that we can best meet the needs of the folks that we are all elected to serve if we meet the collective needs of the people and we pull together as you tried to do here in this partnership.

Again, it is a good bill, and we have got a couple points we would like for you to keep in mind as you go forward. We would like to urge you to mark it up and send this baby over to the House of Representatives.

Thank you very much.

Chairman THOMPSON. Thank you very much, governor. I really appreciate the leadership that you have shown in this area, and it is something that is kind of misunderstood by a lot of people. It has to do with—the benefits of moving in this direction, and we have had a lot of activity in terms of devolution, are first of all it is consistent with sound constitutional principles, and there is a reason that it is set up that way in the Constitution, because what we are talking about is power and the distribution of power. And we all know what the Founding Fathers thought about that and how important it was.

There seems to be a tendency in democratic societies to centralize as time goes on, and we are trying to fight against that not only for constitutional reasons and for distribution of power reasons, which is important in a democratic society, but for very practical reasons. And governors such as yourself who have come up recently with such innovative ideas, so much of the good things that are happening in this country are going on at that level, and we have learned that not all the good ideas come from up here, and that we ought to be very careful in preempting these fields.

As far as this bill is concerned, I appreciate your suggestions. I would like a point of order, too. Frankly, there may be some practical difficulties in getting that done. Maybe we can work together and maybe you can help us get that done.

Governor CARPER. Be happy to try.

Chairman THOMPSON. I think that would be a good idea.

I think in terms of the other point, the bill does have to do with statutes that have already been previously passed, and I must say that there undoubtedly, of course, will be additional rules, many, many rules coming down that have to do—that are done pursuant to statutes that have already been passed. But it is not meant to preempt those statutes that have already been passed. The bill says that preemption can be authorized by the statute, and if courts have previously determined, for example, that a statute preempts certain areas, I think that would be incorporated in the rule.

In other words, I am a little bit concerned about the wording of this and making sure it was clear enough as to what we were trying to do, and I think it needs a little work, perhaps. But we want it to apply to old statutes, but we are not trying to rewrite or preempt all the old statutes, if you know what I mean. So we are on the same track there, I think, and we will continue to work on that.

Thank you very much. Senator Voinovich.

Senator VOINOVICH. I am pleased that we included in this legislation a problem we had, and that is the issue of Medicaid caps, whether they are unfunded mandates, and the issue of whether or not, if you have some of the changes in administrative costs, whether or not that is an unfunded mandate. Mr. Chairman, that is real important because it is a follow-through——

Chairman THOMPSON. You were on to us about that before you ever got here. I remember.

Senator VOINOVICH. Right. The other thing is that on the record I would like your comment about the fact that under the unfunded mandates relief legislation there was to be agency review of impact on regulations. I would be interested in your opinion on whether or not that has happened or not, just for the record.

Governor CARPER. I wish I could tell—I think there has been, but, Senator, I could not tell you for sure.

Senator VOINOVICH. Well, one of the things was that they were supposed to be looking at the regs, and from my experience that has been pretty well ignored in terms of——

Governor CARPER. By some it has been, by others not. It has been uneven.

Senator VOINOVICH. The other is the question of judicial review in terms of federalism impact statements. How important do you think that is?

Governor CARPER. In a perfect world, I think it is desirable. I don't know if you can get it done. And as you go forward, I would—what is the old adage? Don't let the perfect be the enemy of the good. If you can get it done, fine. If you can't, then get what you can.

Senator VOINOVICH. In terms of the suggestions that were made by representatives of the administration today, I would be very interested to have your response to some of those suggestions. We certainly want to make sure that once this legislation is marked up that we have a good chance of having the President sign it. I think that where you feel they may have made some good suggestions that you feel comfortable with that are not inconsistent with what

we are trying to accomplish here, I would sure like to hear about them.

Governor CARPER. Good, and we would welcome the opportunity to submit something in writing. I was in and out of the room while they testified. We will have some really smart people who heard the whole thing and who know this stuff backwards and forwards to help us prepare something that would be helpful.

Chairman THOMPSON. Thank you very much, Senator.

Governor, I know you have other obligations. Thanks again for being here with us. We look forward to working with you.

Governor CARPER. Thanks very much. Let me just say again to Senator Voinovich, if you had something to do, Senator, with getting that Medicaid cap—the language included on the appropriations bills—the entitlement programs, rather, that you alluded to earlier, thank you. That is much appreciated.

Senator VOINOVICH. He heard us.

Chairman THOMPSON. I can attest to the fact that you beat up Senator Glenn and me both over that.

Governor CARPER. Good work. And, Senator, I look forward to being in your State. Your governor, Governor Sundquist, is going to be hosting the Nation's governors and a bunch of people at a technology conference, education technology conference, in about a week.

Chairman THOMPSON. Great.

Governor CARPER. We want to get, naturally, and learn as much as we can from Tennessee.

Chairman THOMPSON. There is a lot to be learned down there.

Governor CARPER. Most of us governors learned what we know from George Voinovich. [Laughter.]

Chairman THOMPSON. Thank you very much. We appreciate your being with us.

Mr. Dorso and Mr. Fekete, we appreciate your forbearance, and, Mr. Dorso, thank you again for coming back. You are getting to be a regular customer to this Committee, and we appreciate the work you are doing in this area. Would you make your statement, please?

TESTIMONY OF HON. JOHN M. DORSO,[1] MAJORITY LEADER, NORTH DAKOTA HOUSE OF REPRESENTATIVES, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. DORSO. Good afternoon, Senator Thompson. I guess I will skip through all of the majority leader stuff and just say, as the governor said, the staff of NCSL and I have put together written testimony which I think is very good, and I encourage you and the Members to read it.

Chairman THOMPSON. We will make the full statement a part of the record.

Mr. DORSO. OK. As I listened to the proceedings here today, it is fairly obvious that you—and I have heard you in some of the presentations that you have made—understand the problem. The problem obviously is the increasing frequency of preemption, not only by Congress but by agencies of government. And, certainly I

[1] The prepared statement of Mr. Dorso appears in the Appendix on page 324.

guess we all understand that the Supremacy Clause is there, and if you have a will to do that, certainly you can.

I don't have a problem with that, and as you have said, if that is your intention, let us know what your intention is as you debate whatever your bill is in front of you that contains that type of activity. I mean, we will all be part of the debate at that time as to whether, in fact, that is exactly what you intend to do.

So I really don't have a problem with preemption from the standpoint as you have pointed out. If we all know that that is what is going to happen, then we should all understand it and what it really means.

Certainly I think that we as States from the other standpoint think that we do a good job in what we do, and we don't like preemption any more than it has to be. We understand that sometimes it has to be. But I think that we all understand that States are probably the basis of a democracy. It is part of the Constitution, a cornerstone of the Constitution, that we keep government as close to the people as possible, and certainly the States are there.

I have a number of instances in my testimony where I talk about instances where Congress has preempted States and it is causing big problems for us. One of them is the Internet Tax Freedom Act. North Dakota is one of those States that did pass a tax on Internet providers, and Congress did its will on that, and we are fighting through that problem.

Obviously, the whole problem about the Internet gets to be sales tax revenues, and I know State Senator Finan, Senator Voinovich—we are good friends, and we have talked considerably about what a terrible problem it is for Ohio. Obviously, Ohio has much bigger sales tax numbers to deal with, but in North Dakota, it is a big problem for us, too, and for the political subdivisions. And it would be unconscionable for Congress to take our right to sales tax away.

Chairman THOMPSON. You can imagine what it is like for a State that doesn't have an income tax.

Mr. DORSO. Well, yes, sir, I understand that.

Chairman THOMPSON. Which is Tennessee.

Mr. DORSO. And it is not only that we have got the State tax problem, but I have retailers in my home town of Fargo, North Dakota, that are going to be put in a terrible position competing against Internet sales and sales taxes is 7, or 8 percent, some of them going to the local subdivision, some of it to the State. I mean, it is just a bad situation, and I think we have got to work through that.

Now, that may take working together, I hope, States and Congress, to do that, but the Tax Freedom Act I think was a bad way to start, and obviously we have talked about the fact that that committee was put together, and we didn't like the way that was done very well either.

But, the Y2K liability bill, we have talked about that particular problem. I would like to talk a little bit about electric deregulation. I mean, that is a subject that comes up in Congress on a regular basis.

I have a friend of mine, Chase Hibberd, who is the chairman of the tax committee in Montana, and we converse on a regular basis, sometimes about hunting dates, but we were just talking the other day about Montana has gone much more quickly than North Dakota as far as electric industry deregulation and a redo of their tax structure.

Well, we haven't moved as fast, but one of the reasons that I have not wanted—and we have an interim committee studying it. We really want to watch what Iowa and Montana, some of our neighboring States are doing to see if they have done it right before we get too far down the road and have to fix it.

Now, of course, on the other side of it, I think we can fix it faster than you could fix it here, because we seem to be able to move quicker on those types of issues. So I think that we as States can react to some of these things faster, and I think we can do it in an inventive kind of way. And we don't have a one-size-fits-all situation. Obviously, the Montana structure, as far as their electric industry, is completely different—well, not completely, but somewhat different than North Dakota's. We are going to have to approach things a little bit different than they. And on so many issues, that is the way it is, and I am sure you are aware of that.

Chairman THOMPSON. You mentioned Y2K. Could you state your concern there a little bit more?

Mr. DORSO. Well, Mr. Chairman, we in North Dakota—I will give it to you from the North Dakota perspective. We had a number of Y2K bills introduced in the last legislative session. We chose to defeat those bills that were introduced, the industry people one, other people different versions. We decided that this was an issue left to the courts, that it was only going to be something that lasted through the year 2000, maybe a couple years thereafter, and we didn't need a law to deal with Y2K liability that would be sitting there on the books for the next century waiting for another turn of the clock.

So we don't perceive that we are going to have a big problem with it in North Dakota, and we really didn't think when we saw what Congress was doing that it was necessary to have, again, a one-size-fits-all thing.

Chairman THOMPSON. I appreciate that.

Mr. DORSO. As I said, I am going to try and move through this fairly quickly in case you have got some questions.

You have already talked about the fact that this is increasing five times. I want to point out another example that I just came across because, being the chairman of the Law and Justice Committee at NCSL, we were dealing with some Native American issues. And the Department of Interior was proposing a rule on trust lands, and the staff at NCSL sent that to me, and I started reading it, and when I got to it, I just got livid because in it it says, "They acknowledge the local tax base may be affected, but the refusal to comply with the Executive Orders is based on a totally unsupported statement that because the loss of revenue is minimal."

Well, I can tell you, in North Dakota, where we have a number of reservations, that that is just absolutely malarkey. And if that is the way that these agencies just go around and put you in a pen by just making statements like that—and, also, I called NCSL, and

I said write them a letter and say that is absolutely a gross misrepresentation of where we are at.

I mean, they either don't acknowledge it at all, or if they do acknowledge it, they put something like that in it.

Chairman THOMPSON. That doesn't necessarily answer the federalism issue, anyway. I mean, one part of it.

Mr. DORSO. But, agencies propose rules all the time that affect us, either fiscally and/or legally. The DOJ on the ADA thing, I mean, I think ADA is fine, there are a lot of great things about it, but when you get to mental health issues and community health care, we have got a lot of issues to work through with that. And they just write a rule that is supposed to fit everything. Well, I can tell you, what fits Baltimore doesn't fit Williston, North Dakota, when you get to that issue. But they seem to think it is, and they just send it out, and we are supposed to all of a sudden comply. If we don't comply, there is reason for somebody to bring a lawsuit against the State. And there is no way for us——

Chairman THOMPSON. But not against them.

Mr. DORSO. No, they don't sue the Department of Justice. They sue us.

So then I have got the Attorney General calling me and saying what are you going to do about it, and that is just another instance that's in here.

Like I say, in conclusion, Mr. Chairman, I know that you have been active in this, and I know Senator Voinovich from his days as governor has been active in this. I was in Ohio when we originally started talking about this, what, 4 or 5 years ago, Senator?

Mr. Chairman, I will tell you I feel so strongly about this I got up at 4 o'clock this morning to come down here. I am going home tonight. But I feel this is a cornerstone of our democracy, and I know that you believe that and Senator Voinovich believes it. We are totally in support of what you are doing here. If we can be helpful in this regard, I know this is not probably the final product, and it has to work its way through.

I certainly think there has to be some safeguards built into it. I heard the judicial review question. I am not sure that we want everybody to sue every agency if they do not like it. But, still, if we do not have some kind of judicial review, at least reserved to maybe the State and some political subdivisions. I do not know what it will mean if it is not in there because, as you have pointed out, the agencies do not seem to care anyway. At this point, an Executive Order does not do anything.

So I think the point of order question, I do not understand that. That is not the way we operate in the legislature in North Dakota. You have to be the judge of whether that is important to you, whether it could be an effective tool or not. I do not know. But if it is effective, and you can get it, as was said by the governor, I guess that is something that you will have to weigh out.

I think the most important part of this is is that you are making the effort to get this done. And just the dialogue of making that effort is important. But passage of it would be great. I think it is something we can build upon. I think there is an experience curve here that would be great for the States, and I certainly want to congratulate you and the co-sponsors for your efforts in this regard.

Chairman THOMPSON. Thank you very much. We really appreciate your taking the trouble to come down here.

Mayor Fekete.

TESTIMONY OF ALEXANDER G. FEKETE,[1] MAYOR, PEMBROKE PINES, FLORIDA, ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

Mayor FEKETE. Thank you, Mr. Chairman. Good afternoon. And, Senator Voinovich, my name, as you stated, is Alex Fekete. I tell people it rhymes with spaghetti.

Not only am I mayor of Pembroke Pines, but I am also the vice chairman of the Finance Administration and Intergovernmental Relations Committee of the National League of Cities. I am pleased to be here this afternoon to testify before you with my colleagues on what we believe is ground-breaking Federal legislation, the Federalism Accountability Act of 1999, S. 1214. This bill embraces and preserves the Chair's principle of federalism and promotes a new Federal-State-local partnership with respect to the implementation of certain programs.

I thank the Committee for having this hearing today. I would also especially like to thank the Chairman, Senator Thompson, and his colleague, Senator Levin, for their leadership, and Senator Voinovich, for working with the members of the "Big Seven" State and local government organizations to craft this bill. At the same time, I would like to recognize and thank the bill's cosponsors for their leadership, which will help pass this legislation.

The National League of Cities is the oldest and largest organization representing the Nation's cities, towns and their elected officials. NLC represents 135,000 mayors and council members from municipalities across the country.

Whatever their size, all cities are facing significant Federal preemption threats to historic and traditional local fiscal, land use and zoning authority. Whatever their size, all cities and all Americans will benefit from legislation such as S. 1214. S. 1214 is important legislation because it permits cities to govern for the benefit of all of their residents.

To illustrate the need for this legislation, I want to bring to the Committee's attention a recent article in the *Washington Post*, which reports on a poll taken by Peter Hart and Robert Teeter. The poll results shows a general alienation of the people from their government. According to this poll, 54 percent of American people do not feel that they have a government body that is envisioned by President Clinton and his "of, by and for the people." People today tend to think of government as the government not our government.

We need to work together to change this perspective, and S. 1214 is the best and most definitive way to do that. The *Washington Post* article, additionally, notes that people feel more connected to their State and local governments than the Federal Government. S. 1214 would help connect Congress with the success of State and local governments by checking preemption by a Federal Government the citizens feel distant from. At the same time, S. 1214 is

[1] The prepared statement of Mayor Fekete appears in the Appendix on page 340.

a springboard to a government that is ultimately more responsive to the people because it creates the partnership between all levels of government, Federal, State and local.

The pervasive and imminent threat of preemption by the Federal Government and the low level of participation by local government in creation of Federal laws and rules, which impact them mostly, is why S. 1214 is needed.

Let me clarify that it is not the intent of NLC to undermine the supremacy clause of the Constitution. In fact, I think everyone in the room today acknowledges that there are times when Federal law should trump State law—when there is a direct conflict between Federal and State law or when it is Congress's express intent to preempt State law.

During the 1960's, for example, the Nation needed the Federal Government to move forward with civil rights legislation that would ensure the equal treatment of all Americans under our Constitution. The problem, however, is not with our dual form of government, as it was established by the Framers of the Constitution, our concern is focused on the frequency of Federal preemption of State and local laws.

Moreover, there seems to be a lack of sensitivity on the part of Federal Government with regard to local government and a preemptive impact of Federal legislation and regulations on local government. It is the National League of Cities' highest priority to put a meaningful check on this preemptive of State and local authority. Allow me to cite a few actions the Federal legislation has taken just in the last few months.

First and foremost, recent legislation signed into law last October impedes States' and local governments' ability to tax sales and services over the Internet in the same manner as all other sales and services are taxed, despite the fact that no such limitation would apply to the Federal Government.

There is also legislation being voted on today by the House of Representatives called the Religious Liberty Protection Act of 1999, which is a massive preemption of State and local zoning and land use laws. This bill, if enacted into law, would chill a city's ability to uniformly apply neutral zoning laws to an entire community by exempting religious-based land use like churches, synagogues and mosques.

Local zoning and land use laws also face severe preemption in the area of takings law, with the reintroduction of takings legislation in the House and the Senate, which would allow developers to pursue takings claims in Federal court without first exhausting their State judicial procedures.

Current law preempts municipal authority over the siting of group homes and preempts a municipality from applying zoning, environmental, health and safety standards to railroads. There is no question that the most significant impacts of these preemptions will be felt at home in our Nation's cities and towns through the erosion of local tax bases and through the inability to enforce local ordinances enacted for the benefit of all who live in our community.

The time to revitalize our federalist form of government is now. The Supreme Court has spoken of the need to recognize that freedom in this country is embodied in the creation of two govern-

ments, Federal and State, and that State and local governments are joint participants with the Federal Government in our Federal system.

Members of the Committee, sometimes a more regional or local approach to governing is needed, and sometimes the needs of the people are better met at local level through the enactment, application and preservation of local laws. The Federalism Accountability Act would help to restore some balance between Federal, State and local governments.

Let me turn to S. 1214. This bill provides cities nationwide with a viable means of alleviating many of the problems associated with Federal preemption of local laws. S. 1214 represents one of the most important efforts to fundamentally rethink the nature and relationship of our Federal system and to expand the partnership of elected government officials. S. 1214 contains several good tools for creating this new idea of federalism, which are beneficial to cities.

Section 4 of the bill defines a public official as including the representative organization of State and local elected officials, those being the national associations of the Big Seven, State and local government organizations. This inclusion is vital to providing cohesiveness to the consultation provision of the bill. It will make it easier to get State and local input from these national associations who can best represent the views of a cross section of their respective membership. It streamlines and simplifies the consultation process for all involved.

Section 5 of the bill requires Senate and House Committees, including Conference Committees, to include a statement with each Committee or conference report on a bill or joint resolution that details the preemptive impact of the legislation, gives the reasons for this preemption and explains how State or local authority will be maintained following the passage of legislation.

Where there is no Committee or conference report, there must be a written statement by the Committee or conference that details the level of preemption. This section is critical to local governments. So often it is the case that a bill passed has severe consequences on our Nation's cities because it preempts State and local law. One such example is the Internet Tax Freedom Act of 1998. Without a Committee or conference report or statement to explain the preemption and the reasons behind it, it is impossible for local governments to know whether such impacts were even considered by Congress. Under this section of the act, local government is assured of such deliberation.

Another very positive and important aspect of this bill is contained in the Rules of Construction. It clarifies instances of Federal preemption by requiring that the intent to preempt be expressly stated in the statute or rule or permitting preemption when there is a direct conflict between a Federal, State and a statute of local law. This section should not be interpreted as a prohibition. To the contrary, this bill recognizes that at times preemption is appropriate.

What this section attempts to do, however, is minimize instances where the intent to preempt is not clear, thus avoiding expensive and adversarial litigation by limiting a court's ability to find that

an implied preemption exists. It, again, makes the Federal Government accountable for what it does, as you stated, Mr. Thompson.

This section also creates a presumption against preemption of State and local law and permits cities to govern by requiring that any ambiguity in the act be construed towards preserving State and local authority. These rules of construction, therefore, are of vital importance to cities.

Section 7 of the bill spells out several important requirements to ensure that State and local public officials participate in the Federal agencies' rulemaking process in an early and meaningful way. This section directs the heads of Federal agencies who are responsible for implementing this act to appoint a federalism officer within each agency. The officer would execute the provisions of this act and serve as a liaison to State and local officials and their representatives, thereby providing cities with a definable person who is a point of contact in the rulemaking process.

Section 7 additionally requires that agency heads give notice to and consult with State and local elected officials and their representative national organizations early in the rulemaking process and prior to publication of a Notice of Proposed Rulemaking when that rule might interfere with or intrude upon historic and traditional rights and responsibilities of State and local governments.

This provision of the bill requires Federal agencies to stop, look, listen and think before they leap into the arena of preemption. It further provides cities with a much-needed voice in their rulemaking process especially when those rules would have a direct and potentially debilitating impact on our Nation's cities. Most importantly, it is an opportunity for local elected officials to work more closely with Federal agencies earlier in the rulemaking process.

This section of the bill furthermore calls for a federalism assessment to accompany each proposed, interim final, and final rule in the *Federal Register* and each rule review submitted to the Office of Management and Budget, when those rules could affect State and local authority. The federalism assessment would detail, analyze and attempt to justify the extent of the preemption of State or local authority. The assessment would describe the extent to which State or local authority would be preserved after the rule's enactment. It would additionally communicate the agency's efforts to minimize the impact on State and local governments and to consult with public officials, including the concerns of those officials and the extent to which those concerns have been satisfied. Agency heads would have to consider these assessments when promulgating, implementing and interpreting the relevant rules.

Last, but certainly not least, Section 9 of the bill provides cities with an overall check on the Federal Government's preemption activities. It requires the Director of the Office of Management and Budget to submit to the director of the Congressional Budget Office information describing each provision of interim final rules and final rules issued during the preceding calendar years that preempts State and local government authority. CBO must then submit to the Congress a report on preemption through Federal statutes, rules or court decisions and legislation reported out of Committee during the previous year of the Congress. Again, this extra

check will help all levels of government track Federal activities dealing with preemption and provides information to local governments on the critical issues.

The above provisions taken together provide for a greater accountability of our Federal Government. They provide for the opportunity for increased input for most directly affected by rule or statute, and they provide the opportunity for a more meaningful and balanced federalism.

Thank you, Mr. Chairman and Mr. Voinovich, for allowing me to make the statement.

Chairman THOMPSON. Thank you very much. Senator Voinovich.

Senator VOINOVICH. I have no questions. I think you have done a beautiful job of laying it out, both of you. And I could not help but think, Mr. Chairman, that we are now considering a bill this week, Patient Protection Plus, that has great implications in terms of federalism and preemption.

Several weeks ago, we had another piece of legislation that the Chairman and I spent a lot of time talking about, a need that was the Juvenile Justice bill, and its implication in terms of a preemption. And there is no question that this is a topic that is very, very important to the future of this country and also to the relationship that we have with our partners in State and local government.

So I just want to say thank you very much for being here.

Mayor FEKETE. Mr. Chairman, may I request that my testimony be part of the written record?

Chairman THOMPSON. The full statement will be made a part of the record. Thank you very much.

Mayor FEKETE. Thank you, sir.

Chairman THOMPSON. Senator, your point is really well made. The so-called Patients Bill of Rights on the floor would basically federalize all of the State laws or supersede all of the State laws that now have to do with HMOs. We have gone to managed care now. Costs were absolutely out of hand, and we had to do something. We went to managed care, and there are a lot of things that we are trying to work out.

But the fact that we are trying to work out the details means that we need for States to have the opportunity in the non-ERISA plans, to do what they feel like they need to do. And Tennessee, North Dakota, and Ohio might have different approaches, and some will work better than others. And we can do what you are doing on the Y2K thing, look and see what is working and what is not working, and what drives up costs, and what are the unintended consequences of what we do.

But we face it every day on something—federalizing crimes we have had. Before Senator Voinovich got here, once in a while we would have a 99 to 1 vote because it would be—we federalized you cannot bring lawsuits against Good Samaritans or something. Well, that is a perfectly noble thing, but there are State laws already on the books on that. And you look at the States on a particular issue, and if some of the States have passed a law about it and some have not, the argument up here is that, well, we need uniformity. And then if you look at another issue and all of the States have passed a law on it, they say, well, what is the harm in federalizing it? We have already got the laws that say we need it.

So it is a constant problem, and we really need the National Conference of State Legislators and the National League of Cities to weigh in on these things because you have a voice, you have clout, people listen to you, and I cannot overemphasize how important it is for you all to stay on the job and help us when these things get to the floor and when we bring them up to get them out of Committee and so forth to really weigh in because people do listen to what you have to say on these issues.

And I want to thank you again. I know you have been inconvenienced greatly, but it is a very worthwhile cause, as you have well stated. So thank you very much for being with us.

Mayor FEKETE. Thank you very much.

Chairman THOMPSON. Let us ask Ernest Gellhorn, professor of law, George Mason University, and Caleb Nelson, associate professor of law, University of Virginia, and Rena Steinzor, associate professor of law, University of Maryland.

Ladies and gentlemen, we apologize for the lateness of the hour. It could not be avoided today, but we really appreciate your bearing with us.

Mr. Gellhorn, would you like to proceed? Your full statements will be made part of the record. You have heard, I think most of you have heard what has been going on here today. And any comments or points that you feel like are especially noteworthy to be made from all of this, feel free to summarize those for us.

TESTIMONY OF ERNEST GELLHORN,[1] PROFESSOR OF LAW, GEORGE MASON UNIVERSITY

Mr. GELLHORN. Thank you for the opportunity of appearing before you. I will focus my remarks, Mr. Chairman, on Section 7 of the bill, which relates to how agencies would implement it. The bill really has two components. One is the Federal preemption component, which I am not addressing, and the second focuses more on federalism assessment, which I will discuss. What is the impact of the proposed rule on States and local governments? This is an important topic because the estimate of the impact of Federal regulations on State and local economies exceeds half a trillion dollars a year. So we are talking about something that is not only important in terms of its impact, but also is basically common-sense legislation.

S. 1214 covers three things: First, before an agency adopts a rule, the bill requires that the agency talk to the local and State Government and local individuals who will be affected by the rule and get their input. Second, S. 1214 also requires that before a rule is adopted the agency must make an assessment of the local effects. Third, the agency must explain how it has taken the assessment into account. The results should be more rational rules that are consistent rules with the legislative intent.

Now, the alternative proposed by the administration of adopting an Executive Order is not meaningful. We have already seen that the existing Executive Order has not really been followed so something more is required. In addition, there is another problem, and that is the Executive Order does not apply to independent agencies

[1] The prepared statement of Mr. Gellhorn appears in the Appendix on page 355.

because of a concern expressed, apparently, by the President as to whether or not orders can reach the independent agencies. I happen to think they can, but they have not chosen to do so. So under the Executive Order alternative, a significant area of its potential regulation would not be reached by the federalism requirement.

The issue that I would call to your attention, where I think additional effort should be given, is to the provisions for judicial review. There is not any in the bill, and as a consequence, the Administrative Procedure Act's judicial review standards would apply. If an agency does not follow all of the procedural requirements, the rule could be stricken under Section 706(2)(D) of the Administrative Procedure Act. That is, a challenge could be brought that not each aspect of the law has been followed, allowing for a challenge under 706(2)(C) of the Administrative Procedure Act. Finally, a challenge made to the agency rule as to whether or not the rule is arbitrary and capricious for a failure to comply with the assessment requirement.

I believe that this broad approach to judicial review should be cut back. Instead, the judicial review provisions, such as set forth in S. 981 that was before this Committee in the last Congress or that is in the Unfunded Mandates legislation, be applied. Indeed, I think there is a parallel between those bills and acts and this bill because under S. 981, the agencies would take into account the costs and benefits of regulation and consider them. That is the very same thing here. It urges agencies to take into account the federalism aspects of every proposed rule and consider them.

There is another thing I do want to emphasize, particularly because of some additional testimony that will be provided, I think this bill is neither pro-regulation or anti-regulation. What it is, it is a plea for sensible regulation. It says, "Look before you leap." Take into account what the rule is likely to do. And that, it seems to me, is sensible whether you are adopting more regulations, fewer regulations, intensifying them or deregulating.

Finally, I would suggest to this Committee that it is perhaps time to engage in an assessment of regulatory assessments and impacts. This is the eighth area in which either Congress or the President has said to the agencies: Analyze what you are doing. I think that many of these requirements make sense. But, of course, there is at some point, analytical paralysis.

Chairman THOMPSON. We do enough assessments to where we come to an assessment of the assessment.

Mr. GELLHORN. I think that is exactly right, Senator, and that is the way I think one ought to put it.

Indeed, if you put all assesstment requirements together, you could accomplish a couple of things. One is, it seems to me, you might find out that some are not necessary. But the more important point is you would put in one place for the agencies to look at the assessments that they ought to undertake.

Right now, they have eight different assessment requirements that agencies must comply with. They are all different; they have requirements that are not always clear; and the agencies aren't certain how to comply. You could have a single process for engaging a regulatory impact assessment, simplify the process, and reduce the number of laws on the books.

Thank you.

Chairman THOMPSON. Thank you very much. Professor Nelson.

TESTIMONY OF CALEB E. NELSON,[1] ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. NELSON. Mr. Chairman and Members of the Committee, thank you for the opportunity to speak with you today about Federal preemption of State law. My testimony will focus on the rules of construction that courts currently apply to determine the preemptive effect of Federal statutes, a subject that is relevant to Section 6 of S. 1214. I will make my remarks brief.

My views on Section 6 are summarized in the written statement that I would ask to be made a part of the record.

Chairman THOMPSON. All statements will be made part of the record.

Mr. NELSON. Thank you, Mr. Chairman.

Mr. Chairman, as you mentioned in your introductory remarks, the preemptive effect of any particular Federal statute is a matter of statutory interpretation. But the rules of construction that courts currently use in preemption cases risk making judges too quick to infer broad preemption clauses.

Suppose that a Federal statute does not contain an express preemption clause. The statute will still have preemptive effects. It will unquestionably displace whatever State law its substantive provisions contradict.

But the Supreme Court has said that, in addition, the statute will be read to preempt State law that, "Stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In effect, then, the courts read every Federal statute that does not expressly address preemption as if it implied the following preemption clause: "No State may enact or enforce any law or policy to the extent that such law or policy stands as an obstacle to the accomplishment and execution of the full purposes and objectives behind this statute."

Imagine what would happen if a proposed bill actually contained such a preemption clause. I suspect that many members of Congress would find the clause both too vague and too broad.

First, the clause is too vague. In the absence of careful statutory specification of exactly what "purposes and objectives" the clause is referring to, it seems likely to lead to unpredictable results as a test for preemption. Many statutes will be the products of compromise. Members of Congress who want to pursue one set of purposes will have agreed on language that is acceptable to members of Congress who want to pursue a different set of purposes. Both sets of purposes will have shaped the statute, but they will have very different implications, quite possibly, for State law. Simply telling courts to base preemption decisions on the full purposes and objectives of Congress does not seem to provide much guidance.

Second, the clause is too broad. Even if all members of Congress can agree on the full purposes and objectives behind a particular Federal statute, they may not want to displace all State law that makes achieving those purposes more difficult. As the Supreme

[1] The prepared statement of Mr. Nelson appears in the Appendix on page 365.

Court itself has acknowledged in other contexts, "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."

This is particularly true in preemption cases. Our Federal system is premised on the assumption that Congress will not pursue Federal interests to the total exclusion of State interests. One of the principal safeguards on which the Constitution relies to protect State authority is the simple fact that members of Congress come from the States. In many contexts, Congress will hesitate to pursue Federal purposes at the expense of State policies that in the judgment of the relevant State authorities serve worthwhile interests in their own right.

Chairman THOMPSON. If we were still appointed by State legislatures, we would not have this problem. [Laughter.]

Mr. NELSON. The Seventeenth Amendment may, indeed, have affected that calculus. Of course, there still is a process for State constituencies to hold members of Congress accountable, and therefore members of Congress continue to take State interests into account to a degree that I think the Court's current tests for preemption fail to recognize. I think that the Court's current rules of construction make judges too quick to infer preemption clauses—to infer preemption clauses that members of Congress might well have rejected if they had actually come before them.

In recognition of this problem, S. 1214 seeks to establish new ground rules for the interpretation of Federal statutes, so that the courts are working off the same page as Congress. As I understand Section 6(a), it would tell courts not to read broad obstacle preemption clauses into new Federal statutes. When Congress enacts a statute that does not expressly address preemption, the statute would preempt all State law that is in "direct conflict" with it, but not State law that merely hinders the accomplishment of the full purposes and objectives behind it.

Of course, if Congress wants a particular Federal statute to include an obstacle preemption clause, it is free to enact one. Congress is already familiar with such provisions. At least one Federal statute includes an express obstacle preemption clause. But Federal statutes enacted after the effective date of S. 1214 would no longer be deemed to establish such provisions by default.

In the absence of a deliberate decision by Congress to preempt all State law that stands in the way of Federal purposes, courts would not try to reconstruct those purposes under the assumption that Congress wanted to pursue them at all costs. In sum, Section 6 would restrain the court's tendency to infer preemption clauses that Federal statutes do not actually establish.

My written testimony discusses Section 6 in more detail. But overall, I think that the rule of construction set out in S. 1214, and particularly the rule of construction set out in Section 6(a), would be an improvement upon the rules of construction that the courts currently apply in preemption cases.

I appreciate the opportunity to present these views. Thank you very much.

Chairman THOMPSON. Thank you very much. Professor Steinzor.

TESTIMONY OF RENA STEINZOR,[1] ASSOCIATE PROFESSOR, UNIVERSITY OF MARYLAND SCHOOL OF LAW

Ms. STEINZOR. Mr. Chairman and Senator Voinovich, I appreciate the opportunity to testify before you today. I feel a little bit like the skunk at the picnic because I think I am the only witness who has some serious doubts about the wisdom of this bill. So taking my courage in hand, I will forge on ahead.

Just as State and local governments tell you that one-size-fits-all regulation does not work for them, I suggest to you that one-size-fits-all devolution is not a solution here. I was listening earlier to the other panel that was talking about the concerns that prompted this legislation, and it seems that certain tax policies having to do with the Internet that are upsetting people and that I am certainly not qualified to comment on. You also mentioned two additional examples of legislation that were on the floor of the Senate recently. Because I teach environmental law I am here to focus on health and safety regulation.

I want to give you an example of a legislative approach that worked very well and suggest to you that it would be, in the long run, a more productive way for you to go about getting the Federal Government in check, making it listen to State and local governments and come up with a balanced compromise. That example is the Safe Drinking Water Act amendments that you passed 2 years ago.

To State and local governments, environmental laws were the major complaint they had. I did a study of the debate on the floor on Unfunded Mandates Reform Act. EPA was clearly the unacknowledged poster child of that debate, and two-thirds of the complaints, roughly, were about statutes like the Safe Drinking Water Act and the Clean Water Act. In response to these complaints, you got about the hard business of sitting down, rewriting that law, having everyone come up and talk to you about it, factoring everybody's concerns into the democratic process, and you came out with a new law just 2 years ago that EPA is now in the process of implementing.

That law will address, as best as our democratic process can address, the concerns of State and local governments. There will still be some people that are dissatisfied with the regulations that the agency comes up with, but that dissatisfaction certainly is not the result of any shortcomings in your efforts to be responsive to those constituents. So, I would suggest to you, that model is the one we need to follow here.

As my colleague, Professor Galston, of the University of Maryland told you just recently when he testified before you, our system of government is based on the brilliant idea that supreme political authority does not reside in any one level of government, but is shared among them and is ultimately the people's to hold. There has to be a constant renegotiation of the balance of power between the three levels of government, and there just is no silver bullet, no shortcut around those negotiations, which must involve detailed, careful consideration in the context of the specific issues.

[1] The prepared statement of Ms. Steinzor appears in the Appendix on page 381.

So I would urge you to consider that ultimately you can provide for all of the assessments in the world, but none of it is going to mean as much as returning to the laws causing the most friction and having the debate fully and honestly in the House and the Senate to decide what the Federal Government policy should be.

In the time I have left, and I know it is the end of the day and everybody is a little tired now, I would like to address some of the ambiguities in the bill that I hope you would address. And like my colleague, Professor Gellhorn, I wholeheartedly support the recommendation that you apply the judicial review provisions of, for example, the Unfunded Mandates Reform Act.

I am going to focus on Section 7, which contains the provisions that deal with how the agencies do their business. Section 7, as you know, requires that the agencies notify, consult with and provide an opportunity for meaningful participation by public officials potentially affected by a rule. It covers proposed, interim final, and final rules. Federalism assessments must be considered in all decisions regarding a rule.

Well, first, I need to correct a small mistake I made in my written testimony. I had said that approximately 4,000 minor rules might be affected. Speaking to Mr. Copeland of GAO earlier, I learned that the actual number is 8,000. I would be happy to provide the figures for the record, and I would like an opportunity to correct my testimony. This bill would apply to all of them.

The Unfunded Mandates Reform Act, in contrast, only applies to about 30 to 50 a year. Now, maybe you do not want that small a universe. But somewhere along the continuum, I would suggest to you is a better place to draw lines than at 8,000 rules.

In EPA's case, just as an example, this additional workload could easily break the straw of what is already a sagging camel's back. The agency is now functioning with a budget that is a mere 15 percent higher in real dollars than it was in 1985, before the passage of a dozen major new rules, including the 1990 Clean Air Act amendments. And it really is no accident that we love to hate a Federal bureaucracy that can never accomplish what you tell them to do. And, again, these budget realities argue for going back and revisiting some of those laws and trimming out some of the underbrush.

Finally, I would urge you to just consider what it is going to mean if people bring agencies to court because they failed to find each and every elected official who was potentially affected by the rule. This bill would exclude the professional administrators that are relied on in highly technical areas like environmental protection. You would not be hearing from the State environment commissioners nor the experts that run the programs. You would be hearing from elected officials only.

Would consulting with the staff of the National League of Cities be adequate? What if a handful of local officials from a group of cities that are not members of the League decided that they really dislike a rule and go to court arguing that the League staff failed to adequately represent their interests? In another life, I worked closely with the National League of Cities, and I know that such satisfaction is a really common occurrence. You cannot make all of

the people happy all of the time. You cannot tailor legislation to fit every local circumstance.

So I would really urge you to consider being clearer in the language so that we do not end up with what Professor Thomas McGarity, in his usual very astute way, calls further "ossification" of the rulemaking process, or the endless procedural requirements that make it very difficult for the agencies to fulfill their mandates. Laboring under such a burden, they cannot do what you want them to do and reinvent themselves, as everybody is demanding.

I ended my testimony with a quote from D.C. Circuit Chief Judge Patricia Wald, who said in a speech a couple of years ago that all of these procedural requirements that you are asking the courts to administer, in essence, will put them in a "checklist" mode rather than a "safety-value" mode, where they are trying to focus on catching agency decisions that, on the merits, are just very bad. If they are required to deal with all of these elaborate requirements, you may get a different quality of decision than you really intended to get. And, again, I think that Professor Gellhorn's suggestion regarding judicial review is a good one.

Thank you.

Chairman THOMPSON. Thank you very much.

You brought my attention to something that occurred to me earlier on. I had made a pledge to myself that I would never use the word "meaningful" in any context, in any statement, or be a part of any legislation that had it in it, and I am going to try to do something about that. [Laughter.]

Ms. STEINZOR. You can see how the courts would react.

Chairman THOMPSON. Well, I mean, even in any context. I think it is the worst-used word in the American language right now, and we can do better than that.

I do think that it is a valid point, though, on some of the points that you make, which all are very good ones, to remember that this is not a devolution bill. This does not come down on the side of devolving or not or regulating or not or preempting or not. All it does is try to set the ground rules for when Congress is silent. Congress needs, I think, to address these issues more.

You were talking about the Clean Air Act, Congress sat down and decided what they said, "We are trying to do too much up here, too much of the wrong things. Let us give the States more authority in these areas." That was a conscious decision. So I do not think that is what we are trying to do here. We are trying to require Congress to face up to those decisions and to give the agencies and the courts some guidance as to when Congress chooses not to, what the presumption is going from presumption toward preemption, perhaps, to one that is not.

The problem, I mean, the point—I have been concerned about putting regulation on top of regulation, and to what extent that maybe we are doing that sometimes. And these things wouldn't be a problem if some of these agencies were doing what they were supposed to. It is not like this consideration of complexity and checklists is in a vacuum. It is in response to another problem, and we are trying to balance all of that out. And we are expending resources, and it does take some time. But the same price—on the

other hand, we are saying, the President is saying in an Executive Order, that they ought to be doing these things anyway.

So it really points out the fallacious nature of the Executive Order. Because we say, on the one hand, in the Executive Order we ought to be doing all of these things, but on the other hand, we are saying we really cannot because it is costing resources, and we are overburdened. So that is what we are trying to get around here.

Ms. STEINZOR. May I?

Chairman THOMPSON. Yes, ma'am.

Ms. STEINZOR. First of all, I think you are having more of an influence than you realize. I spent the summer studying what EPA is doing to devolve its programs, and it is in constant consultation with State officials, it has task forces, it is listening to them very carefully.

The concern I have is the unintended consequences. I read an article that was published just a few months back that basically advised anyone who did not like a Federal environmental regulation how to nail it. And one of the major examples was the judicial review provisions of the Unfunded Mandates Reform Act. The article urged people to bring such challenges. Now, I think that is not wrong legal advice. I think that is a very carefully drawn bill. But what I am worried about is that you make a decision, you the Congress, you tell the agencies to go off and do something, and then someone who still has their nose out of joint gets to go running off to court.

Chairman THOMPSON. But do you know what the sanction is for them not doing a proper assessment under the Unfunded Mandates Reform Act? Making them do it, going back and making them do what they were supposed to do to start with. It does not defeat the rule. It does not overturn the rule, even if they do not do it.

I would think if that was a concern and I was a part of the Executive Branch, and I was in OIRA, for example, I would say, "Look, we need to do what we say that we are doing." That is the real solution. That is the way to try to avoid this, not fall down on our job and then be critical of those who were trying to come in and make us do what we say that we want to do anyway. But I get your point. I understand what you are saying. I think it is a proper balance that we are trying to reach here.

Mr. Nelson, the first of your comments are somewhat in a different direction it seems to me like than Mr. Moss. He was saying here is a review of the cases that indicate that the courts require—I wrote down—that require clear evidence that Congress intended to preempt before the Court will preempt.

And then I read your testimony here, and I see in the areas of labor law, Customs, Clean Water Act, patent copyright, and all of that, where you believe that even though there has been some recent adjustment maybe that if Congress is silent on is just kind of jump ball, and there is no telling where the Court is going to come out. They try to determine congressional objectives, and national purposes and all of that.

So I take it, he says that it is not that much of a problem, courts are restrained. You do not see that much restraint with regard to the courts, I take it.

Mr. NELSON. I think preemption jurisprudence, in general, is just a muddle. I think it is common for courts to invoke a so-called presumption against preemption. Although there is a recent Eleventh Circuit case in which the court says there is no presumption against implied preemption, against obstacle preemption. So I think the lower courts are a little bit confused, despite some suggestions that there is such a presumption.

Even if the courts apply a presumption against preemption, they are doing so in the context of a very broad test for obstacle preemption, where Federal statutes are read to include a clause that I think most members of Congress would just consider too vague and too broad to include expressly in any piece of legislation, a clause that says that State law is preempted to the extent it gets in the way of the full purposes and objectives of this statute. I think that is something that just is bound to lead to a muddle.

And if you look—looking at law reviews is a hazardous business, but I think the academic commentators who have addressed preemption agree that the jurisprudence is currently pretty chaotic. They tend to focus on preemption in particular areas of the law, but when they do so, they use the words "chaos" or "awful mess" or "wildly confused lower court rulings."

Now, I think when a doctrine causes such problems in area after area, it is time at least to think about whether the unifying doctrine that the courts apply to preemption jurisprudence is just unworkable.

Chairman THOMPSON. You mentioned the problem with the courts trying to determine the common purpose or the common objective when different members of Congress have different purposes and objectives. But it occurred to me that in more cases than not, with regard to not necessarily the subject, the subject of the legislation is one issue and what the common objective was there, if any. But with regard to the question of preemption, there was probably no purpose—it was not a matter conflicting purpose—it was not thought of. My guess is that in most cases this never occurred to anybody, unless there was an obvious situation. And if it is an obvious conflict, then that really kind of solves the problem to a certain extent.

But do you think that is a fair assessment?

Mr. NELSON. Mr. Chairman, I think that is a fair assessment, and I think the Supreme Court acknowledges as much in some of its cases. In labor cases, for instance, the Court has said, more or less, we know that Congress did not think about this, we know it did not have any intent. We are going to reconstruct what we think it might have wanted to do.

Chairman THOMPSON. What we think it should have been.

Mr. NELSON. Very close to the same thing, yes. Yes, Mr. Chairman.

I would say one thing, with respect to Mr. Moss's testimony. The case of *Gibbons versus Ogden* from 1824 is, I would say, an example of a "direct conflict." I am not sure that it would fall under S. 1214. There you had a Federal statute that, at least as construed by the Supreme Court, said, Ships that have Federal licenses can engage in the coasting trade. A New York statute said, Certain types of ships that have Federal licenses—in particular, among

other ships, is steamboats—cannot engage in a particular aspect of the coasting trade, ferrying passengers from one place to another place.

That seems like a "direct conflict" where the Federal statute is saying these ships can do this, and the State law is saying no, they cannot. It seems an example that, perhaps, does not show that the sky would fall under S. 1214.

Chairman THOMPSON. That is a good point. Senator Voinovich.

Senator VOINOVICH. First of all, Professor Gellhorn, thank you for your suggestion that we ought to look at the language of S. 981 in terms of these provisions of judicial review.

I also was interested, you talked about eight different assessments that are going on and that perhaps there are eight different assessments required today and that you think that perhaps they could be combined in some way to expedite it? Would you comment on that?

Mr. GELLHORN. They range from family values to civil justice reform, to tribal governments, to federalism, to unfunded mandates, to small business impacts, etc. And it seems to me that rather than forcing the agencies to look at each separate Executive Order or each separate statute to find out what is required, it would be sensible to put that all in one assessment requirement imposed upon the agencies—that is, one procedure for engaging in the assessments, one process for identifying notification, one process setting forth for how the agencies should consider the results of their studies, and one similar process for judicial review.

Having eight different patterns out there is likely to lead to confusion. Indeed, I think it is, in part, the reason that the agencies are not making the required evaluation in every instance. The courts are not always applying it. And that that ultimately perhaps does create a burden that is unnecessary. So I would suggest that is a simplification.

Senator VOINOVICH. I would like to find out more about your thoughts on that, and how this fits in with what we are doing right here. Because that seems to make a lot of sense to me.

Mr. GELLHORN. I am happy to do so. I have been working with your staff.

Senator VOINOVICH. Whether it would be germane to what we are doing here, Mr. Chairman, or not, I do not know, but I would sure like to find out more about it.

I was also interested in your testimony about safe drinking water because I was very much involved in that. In fact, I was at the White House when the President signed the bill. And we started out on that legislation, I recall when no one said we would get it done because the environmentalists I recall being accused of wanting to poison the water and everything else. But we worked at it.

And I am interested in your reference to that and how it fits in with what we are doing here. Was it the process that went into that, where everybody was together and that is the way we should get things done or was there some specific aspect of Safe Drinking Water that you are honing in on, and I am—perhaps that portion of it that dealt with the cost benefit process that you go through to determine whether a reg should be carried out or not?

Ms. STEINZOR. I was making the first point, which is the broader one, that in 1986—and I know you were very actively involved in the debate—you passed a law, not so long ago. And then as people started to implement it, some people became very distressed and came back to you. And in 1996, through this very arduous debate—you rewrote the whole thing.

And that is what I am suggesting, that there really is not any replacement for that; that if people are disturbed in the environmental area about the way that all of these programs are working, then the solution is to get back at the organic statutes, the authorizing statutes, and work it out with the ultimate compromise that nobody completely "wins." It was really the perfect melding of all of the different interests, and it was very hard work.

I mean, the 1990 Clean Air Act amendments, for people who were not here, Senator Mitchell sat in a small room off the Capitol for hours and hours negotiating changes with his colleagues.

Senator VOINOVICH. But the fact is that process that you are talking about does not really help us with the myriad of regulations that are being passed and legislation in terms of whether it is preempting State law or not preempting.

Ms. STEINZOR. No. What I am concerned about, to be real clear about it, is that you tell EPA to go off and do some regulations after having gone through this big arduous process. There are still some people that are not happy about what the 1996 amendment said. You tell EPA to go off and do their regulations. Those same people that are not satisfied with the compromises and your decisions come in and start complaining to the agency.

And then if you are not careful in a bill like this, this becomes a tool to be used to stop all of those regulations that you told them to do, and they never get around to eliminating doing the things that I would agree they need to do; cut out the underbrush of their excessive regulations, reinvent the way they do business, give local and State Governments more flexibility. A couple of court decisions, and they are frozen, and frozen agencies are not any more effective than unduly activist ones.

Senator VOINOVICH. Well, I can tell you I, for years, have participated as a mayor and as a governor in a lot of exercises with Federal agencies, and in all due respect, so often they go through the motions, and that is about the extent of it. And that has been very, very discouraging over the years.

I do think, though, that the point you make in terms of the meaningful participation and clarifying what that means is pretty doggone important, so that you don't end up with a lot of controversy about that. It ought to be pretty specific, Mr. Chairman, I think, in order to avoid, first of all, someone claiming it would be arbitrary and capricious, and second of all, just so the agencies understand what that actually means and the people that are supposed to be listening to it understand what that means and know more than what that means.

Chairman THOMPSON. The Senate might say it means whatever it means in the Executive Order.

Mr. GELLHORN. Well, I think you can avoid the problem if you have a more limited judicial review. Because the question of who gets notified would not be subject to judicial review under the more

narrow approach. That is exactly the kind of question that ought not to be examined in the court, as long as there has been some attempt, a serious, reasonable attempt, to reach out, whether they have a contact with every State or five States, it seems to me not to be something that a court ought to wrangle with.

Chairman THOMPSON. Yes, I was interested in your comments along those lines, too, and perhaps using the Regulatory Improvement Act as an example, where it is you are required to do it, but it goes into the entire rule, and you look at the rule to see whether or not it is arbitrary and capricious. That is a little different though than the unfunded mandates because I do not think there is really any sanction. If they do not do it, you cannot invalidate the rule I think under that act. I think regulatory improvement is probably a better example there.

But that is something that we ought to look at because we are not interested in buying a whole lot of new lawsuits, even though I think the bigger potential question does have to do with the opportunity of meaningful participation and all of that. I think that that needs to be a little more specific. But on the others, as I indicated a while ago, it is more of a requirement to make a description or an analysis or the extent of which it does not go into the validity of the rule itself. It is just asking the agency, telling the agencies to describe what is going on. And so it is, you can still, I mean, anybody can file a lawsuit, I guess, but you are not going to hold up or defeat an agency rule if they are doing halfway what they are supposed to be doing, I think, in that regard.

Senator VOINOVICH. Mr. Chairman, one point that is interesting is that I periodically look at the Unfunded Mandate Relief legislation to ascertain whether or not it is doing any good. And in terms of regulations, it is not doing much good at all.

But just the fact that you have the point of order, it is amazing the impact that that has had on agencies coming forward with the things that might be interpreted as unfunded mandates.

So somewhere along the line, although it is restricted to, what is it, $100 million? It said there is a certain amount of dollars.

Mr. GELLHORN. $100 million.

Senator VOINOVICH. Yes, that is involved; that that reduces the area covered. The fact that I think it is CBO is reviewing this has really made a difference, and it kind of, it is comforting to know that the thing is working.

Mr. GELLHORN. Well, I think you make a very important point, and that is that one of the purposes behind this bill is to get the agencies to think a little differently, to pay attention to this. It is sort of an intellectual discipline. But it seems to me also that without any judicial review, which is what the administration spokesman suggests, it becomes meaningless because there is no discipline, and we have already seen now several years of inactive response to that kind of——

Chairman THOMPSON. My guess is they probably know that that horse is out of the barn.

Mr. GELLHORN. I think that is right. In fact, they said it by saying they would approve a targeted approach. So I thought the signal was rather strong.

Chairman THOMPSON. I think so. I think we ought to be able to get that done.

Do you have anything further, Senator?

Senator VOINOVICH. No.

Chairman THOMPSON. Thank you very, very much. We really appreciate you being here with us and waiting until this late hour. But your analysis and your written statements are extremely helpful to us. And we look forward to working with you further.

We are adjourned.

[Whereupon, at 5:41 p.m., the Committee was adjourned.]

A P P E N D I X

A P P E N D I X

TESTIMONY

"THE CURRENT STATE OF FEDERALISM IN AMERICA"

BEFORE

THE UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS

BY

THE HONORABLE TOMMY G. THOMPSON
GOVERNOR
STATE OF WISCONSIN

WEDNESDAY, MAY 5, 1999

INTRODUCTION

Good morning. Thank you Mr. Chairman for inviting me here today to speak to you and the distinguished members of this Committee regarding the current state of federalism in America.

Mr. Chairman, federalism and devolution, as you well know, represent a cornerstone of our nation's underlying democratic principles.

The 10th Amendment to the Constitution of the United States recognizes the uniqueness that continues to exist and thrive in each and every state in America. More importantly, the 10th Amendment acknowledges that the states have the authority and the ability to minister to their own exigencies.

When our forefathers debated how our nation would be governed, they devised a clear set of principles that defined the roles and responsibilities of the federal government and state governments. Yet, over time, adherence to those principles has eroded.

Recently, a shift away from the "Washington knows best" attitude ushered in the first change in majority in the United States House of Representatives in 40 years. A strong component that helped fuel the shift of power can be directly attributed to a platform that clearly emphasized a return of power and control to the state level.

But somehow the shift towards devolution came to an abrupt stop. The American people, and governors such as myself, were led to believe that real reform was on the way, only to realize that Washington would not truly reflect the guiding principles of federalism designed by the framers of the Constitution.

To this end, Mr. Chairman, it is with a sense of optimism for reform and historical gravity that I address this august body.

I strongly commend you for your appreciation and attention to the issue of federalism. For when granted the power and flexibility, states and local governments have proven to be the innovators of the ideas and reforms that are improving the lives of all Americans.

Throughout our history, state and local governments have acted as the laboratories of democracy. State and local governments continually amaze us with innovative and decisive action when they are allowed to flourish unfettered by excessive federal restraint.

It is critical that we closely examine the relationship and responsibilities respective to our governing bodies, and review the impact federal restrictions have on states' ability to govern effectively. More importantly, as we enter a new millennium, we must

reinvigorate the partnerships among the federal, state and local governments to ensure the American people are the benefactors of a strong, united effort to address and solve the problems that face our great country.

As President of The Council of State Governments, I speak to you today on behalf of an organization whose individual members are involved daily in conducting the peoples' business at the state level.

CSG is comprised of state leaders from all 50 states and U.S. territories representing all three branches of government. CSG's membership is the living embodiment of the vibrancy of American federalism.

HISTORY OF CSG'S FEDERALISM ADVOCACY

CSG has consistently been a strong proponent of the federalist model. Our commitment to sharing those principles was reinvigorated at a summit convened in November of 1997, following enactment of the Unfunded Mandate Reform Act of 1995 (UMRA).

At the prompting of Governor Michael O. Leavitt of Utah, the meeting, held in conjunction with the American Legislative Exchange Council, the National Conference of State Legislatures and the National Governors' Association, was convened to recommend state reaction to the historic devolution of shifting responsibility from the federal to the state governments.

Then, as now, states faced a variety of challenges and opportunities as they approached varying degrees of federal restriction. The summit produced an eleven-point plan aimed at improving balance and greater accountability to the state-federal partnership.

I have attached a copy of the eleven points advocated at the conclusion of this meeting to my written testimony, but I would like to summarize those objectives and provide a few brief examples of how federal restrictions and interference is impacting our ability to institute positive reform in our respective states.

The principals voted on and passed at the meeting include requiring Congress to justify its constitutional authority to enact each given bill; limit and clarify federal preemption of state law and federal regulations imposed on states; streamline block grant funding; and simplify financial reporting requirements.

EXAMPLES OF FLAWS IN THE CURRENT FEDERALIST STRUCTURE

As Governor of the state of Wisconsin, I have dealt with a wide variety of federal restrictions that prevent my state from reaching its full potential and advancing the best interest of our citizens.

From welfare reform to health care, Wisconsin has become America's laboratory of reform, instituting dozens of innovative initiatives that have made our programs models for the nation. Yet, I have had to travel to Washington to solicit, on bended knee, the permission to implement our landmark reforms.

I am not alone. My experience and the experiences of other state leaders have made the boundaries of the devolution debate clearer today than ever before. Time and time again, we have developed and passed legislation to deal with our unique problems, only to be rebuffed by the federal government.

Let me briefly describe some more recent issues that illustrate the frustration at the state level.

Welfare Reform:

The integrity of the 1996 welfare reform agreement is threatened by attempts by Congress and the administration to reduce the funding and restrict the flexibility of welfare-related programs, including the Temporary Assistance for the Needy Families (TANF) block grant.

In 1996, Congress, governors and the administration entered into a historic welfare reform agreement. In exchange for assuming the risk involved with accepting the primary responsibility for transforming the welfare system from one of dependency to self-sufficiency, Governors agreed to five years of guaranteed funding along with new flexibility to administer federal programs.

Any attempt to change welfare reform-related programs or funding is a serious violation of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and would undermine states' welfare reform efforts.

In Wisconsin, and throughout America, welfare reform has demonstrated that states can best solve problems when given flexibility and support. Congress gave the states the freedom to design their own welfare replacement programs and the block grants to support them. As a result, hundreds of thousands of families are climbing out of poverty and pursuing their piece of the American Dream.

CSG and the nation's governors urge Congress and the administration to reject any proposals that reduce funding or restrict flexibility for welfare-related programs.

Land and Water Conservation Fund:

Since the 1960's, the federal government has collected nearly $4 billion in annual receipts from the development of oil and gas reserves on the outer continental shelf. Congress has approved appropriations of up to $900 million per year of those funds to the states under the Land and Water Conservation Fund, but the current administration has been using the money to shore up the federal budget.

The Conservation Reinvestment Act of 1999 (S-25 and HR-701) seeks to rectify this situation by reinstating funding to the states for land acquisition, conservation, and habitat improvement programs.

The Council of State Governments has adopted resolutions in support of the Conservation Reinvestment Act, and full funding for the Land and Water Conservation Fund, Coastal Impact Assistant Fund, and other programs that help to mitigate some of the environmental impacts of offshore mineral development.

Legalized Gaming:

The federal government should not usurp the states' authority to regulate legalized gaming. The National Gambling Impact Study Commission is currently conducting fact-finding studies on the "economic and social impacts of legalized gaming on states, tribes, communities and individuals." However, the members of this commission do not represent the interests of the states, and there is concern that the Commission's true intent is to recommend national legislation to regulate gaming.

States can and should set sound gaming policies that address key issues and challenges associated with legalized gaming, and state gaming officials should enforce such policies. Some types of gaming, such as Indian gaming and Internet gambling, require cooperation from appropriate federal agencies. But it is the duty and responsibility of individual states, not the federal government, to regulate lotteries and casinos within their boarders.

FEDERAL LEGISLATION UNDER CONSIDERATION

Much has been accomplished since that 1997 meeting, but much more remains to be done.

Already in the 106th Session of Congress the House has passed HR 350 – the Mandate Information Act, HR 409 – the Federal Financial Assistance Improvement Act, and HR 439 – the Paperwork Reduction Act. The Mandate Information Act clarifies the point of order provision of the Unfunded Mandate Reform Act, applying the order to any cut or cap in entitlement programs such as Medicaid, food stamps, and child nutrition, unless states are given "new or expanded" flexibility to manage the cut or cap.

The Federal Financial Assistance Improvement Act will require the Office of Management and Budget (OMB) to develop uniform common rules for its seventy-five crosscutting regulations. Under this legislation, OMB must also develop electronic filing and management of grants to reduce paperwork. Just two weeks ago this very committee held hearings on S. 746 – the Regulatory Improvement Act.

The Council of State Governments believe S. 746, co-sponsored by at least three members of this committee, is a move in the right direction because it will provide needed consultation with state and local officials when federal agencies promulgate new regulations and will require risk assessments and cost-benefit estimates for such regulations.

Additional proposals and ideas are circulating that may further impact the current state of federalism. On March 10, 1999, the Big Seven State and Local organization principals signed a letter that was forwarded to Congress in support of the "Regulatory Right-to-Know Act of 1999."

By calling for an annual report to Congress by the President and the Office of Management and Budget, which analyzes the impact of federal rules on federal, state and local governments, this bill encourages open communication between federal agencies, state and local governments, the public and Congress regarding federal regulatory priorities.

As you know, Mr. Chairman, staff of the Big Seven state and local organizations has also been collaborating with staff members of this Committee in an attempt to fashion legislation to protect and reiterate the partnership between federal, state and local levels of government.

CSG believes that it is important to bring such legislation to fruition. Among the principles we would like to see embodied in such legislation would be prior consultation with state and local elected and appointed leaders in drafting federal legislation, regulations and executive orders with an intergovernmental impact.

Federalism Partnership legislation should provide for federal assessment through federalism impact statements and provide a form of judicial review for enforcement. Ultimately, CSG believes a true federalist partnership must reflect the intentions of the 10th Amendment, whereby states were granted deference when the Constitution failed to explicitly empower the federal government.

CONCLUSION

As state leaders concluded in their 1997 conference on federalism, "In order for our country to be an innovator at home and leader abroad in the 21st century, it is imperative that our unique federal partnership devise improved divisions of labor and achieve strategic intergovernmental restructuring best suited to the changing public policy circumstances that confront us."

The states have shown, with the limited experimentation the federal government has allowed, that we can manage complex problems and put our ideas to work, reconnecting the American people with their government.

Devolution will have a profoundly positive effect on the delivery of government programs and services as states compete with one another to devise the best systems. Its impact on the political process, however, will be equally profound: nothing less than a restoration of the American people's confidence in their government.

Again, I thank you for this opportunity to speak with you today, and I look forward to our ensuing conversation.

FEDERALISM STATUTORY PRINCIPLES AND PROPOSALS

This paper highlights 11 statutory approaches designed to bring better balance and greater accountability to the state-federal partnership. Many of these proposals were developed and endorsed as part of the States' Federalism Summit, convened in October 1995. Each proposal addresses the ways in which Congress goes about its policy setting business vis-à-vis the states. The proposals could be combined into an omnibus State-Federal Partnership Act or could be introduced singly or in some combination.

PROPOSALS

I. Declaration and Justification of Constitutional Authority.

Require Congress, as part of considering any new or reauthorizing legislation, to declare and justify its constitutional authority to enact each given bill. This provision in all bills requires Congress to treat the Tenth Amendment as an integral, living part of the Constitution. (This procedure was made a part of recent changes to the committee rules of the House). The United States v. Lopez decision ensures that congressional members understand and acknowledge specific limits to federal powers rather than assuming general power to enact any bills deemed appropriate at the moment. In addition, the Supreme Court upheld this principle in the Printz v. United States and New York v. United States decisions, which reinforce the idea of dual sovereignty.

II. Limit and Clarify Federal Preemption of State Law.

Preemption is the partial or total displacement of state laws and/or local ordinances by federal laws and/or agency rules under the supremacy clause of the US Constitution. Since more than half of all explicit federal preemptions of state laws enacted by Congress in our 208-year history have been enacted only during the past 30 years, it seems necessary now to: require bill sponsors to examine the impacts of proposed preemptions on states; increase consultation with states; and, to require clear disclosure of intent to preempt with appropriate notice to states. This proposal ensures increased awareness of proposed preemptive activity, and requires regular review and justification of existing preemptions. For decades, the Supreme Court has been unwilling to find preemption of state authority unless there is a clear and manifest congressional intent to preempt.

III. Prohibiting Federal Conscription and Coercion of State Governments.

The growing practice of Congress forcing states to carry out federal programs or to enact state laws in accordance with federal rules could be prohibited by a statutory provision holding that no state shall be obligated, without its consent, to enact or enforce any state law or regulation pursuant to, or **administer** any federal regulatory program imposed by, a law enacted by Congress. This same principle

was upheld by the Supreme Court in the New York v. United States and Printz v. United States decisions.

IV. **Points of Order on the House and Senate Floor.**
An Omnibus Federalism bill could provide for a point of order to lie against any bill that does not comply with the citation of constitutional authority provision, ensuring all members consider the federalism implications of legislation. The Unfunded Mandates Reform Act of 1995 (UMRA) already provides this specific procedure for unfunded mandates. This could be expanded to include challenges to constitutional authority.

V. **Consolidating Categorical Programs into Block Grants.**
Working with state legislators and governors, Congress and the President should accelerate the recent trend toward consolidation of categorical programs into block grants. Block grants have proven to be effective mechanisms for tailoring programs to the unique needs of the 50 states. Legislation creating block grants should be encumbered with regulations, restrictions or earmarks. Block grants should not preempt state laws and procedures; they should avoid "set-asides." Block grant legislation should reduce front-end paperwork and post-audit requirements and establish minimal reporting requirements emphasizing outcomes, rather than process. They should embrace the discretion of state policymakers.

VI. **Protecting State Laws and Procedures in Expending Federal Funds.**
In light of states' concerns that federal rules often direct states to expend federal funds in ways that complicate, contradict, or conflict with state laws and procedures governing the states' own expenditures, this proposal would clarify that any funds received by a state after the date of enactment of the federalism statute will be expended only in accordance with the laws and procedures applicable to expenditures of a state's own revenues.

VII. **Prohibiting Conditions of Federal Aid not Germane to Aid Purposes.**
Since the 1960's, Congress has increasingly attached conditions to federal-aid programs that are not germane to the original purpose of programs that allow Congress to assert powers not delegated to it through the federal Constitution. These have been upheld in court based on the "voluntary" nature in which states accept federal aid, even though states cannot realistically refuse such aid. This proposal states that no condition on the receipt of federal funds by a state, imposed by or pursuant to a law enacted by the Congress, shall be valid unless the condition is stated clearly, is strictly germane to the purpose of the grant-in-aid, and does not more than specify the purposes for which, or manner in which, the funds are to be spent by the state.

VIII. **Clarify the Intent of the Unfunded Mandates Reform Act.**
The 1995 UMRA law needs to be clarified in a few areas; how to interpret its definition of "mandate" with respect to caps on, or reductions in, federal funding for large entitlement grant programs where states have some compensatory

flexibility; whether the effects a bill may have on the costs of existing mandates should be counted as the costs of a mandate under UMRA; and how to estimate the direct costs of extending the life of an expiring mandate.

IX. **Requiring Congressional and Executive Federalism Impact Statements.**
In the same vein as the Environmental Impact Statements that are now required when a road construction project is proposed, Federalism Impact Statements can be required (for which precedent has already been established by Executive Order 12612) that will force Congress to prepare such statements in consultation with elected state and local officials on all bills that may have an effect on the distribution of powers and responsibilities in the federal system; and which require executive branch agencies and independent agencies to prepare such statements on all proposed rules.

X. **Federal Regulatory Streamlining.**
Federal regulations cost hundreds of billions of dollars each year. However, the rulemaking process is often a mystery to the general public, and many stakeholders agree that cost-benefit analysis and comparative risk assessment, plus greater public access to the information which is part of agency decisionmaking, would improve regulatory efficiency.

According to the U.S. General Accounting Office (GAO), of 129 regulatory actions it has reviewed at four major regulatory agencies (EPA, HUD, DOT, OSHA), fewer than 25 percent had a clear and simple document available illustrating changes made during the rulemaking process-which is overseen by the Office of Information and Regulatory Affairs.

A regulatory reform bill is needed to improve quality and accountability in rulemaking through cost-benefit analysis and risk assessment, peer review of methodologies, as well as a process for reviewing existing rules. (Note: Senators Fred Thompson (TN) and Carl Levin (MI) have introduced a bipartisan compromise Regulatory Improvement Act, S. 981, which would implement most of the improvements states seek.)

XI. **Federal Financial Reporting Simplification.**
There are over 600 different federal financial assistance programs to implement domestic policy. Each as extensive federal administrative requirements, which are often duplicative, burdensome or conflicting, thus impeding cost-effective delivery of services at the state and local levels. A bill designed to streamline procedures for application and reporting requirements and to simplify paperwork associated with federal domestic financial assistance is necessary. (Note: Sen. John Glenn (OH) has circulated a draft Federal Financial Assistance-Management Improvement Act to achieve many of the financial management reporting reforms states are seeking.)

T E S T I M O N Y

Statement of

Governor Michael O. Leavitt, Utah

Vice Chairman, National Governors' Association

before the

Committee on Governmental Affairs

United States Senate

on

Federalism

on behalf of

The National Governors' Association

May 5, 1999

NATIONAL GOVERNORS' ASSOCIATION
Hall of the States • 444 North Capitol Street • Washington, DC 20001-1572 • (202) 624-5300

Good morning Mr. Chairman and members of the committee. I appreciate the opportunity to appear before you today on behalf of the nation's governors. Strengthening our federalism partnership is the top priority of the National Governors' Association. Over the last several years, Congress has accomplished much on behalf of state and local governments. We are here to express our appreciation for your work and urge you to keep moving forward on a number of major issues.

State and local elected officials have always worked closely with Congress and the administration on critical issues. In times of national distress, the states immediately step forward to work with you in unifying and mobilizing the nation for quick action.

But in times of crisis or times of calm, we have strong ideas on how we should work together. The National Governors' Association's Washington office was actually founded in 1967 to protect the appropriate balance of federalism between state and federal governments. Our first initiative was to work with Congress to convert the Law Enforcement Assistance categorical grant into a block grant to the states. We now have more than one dozen block grants.

Progress to Date

In the last decade, we witnessed major advances as Congress entrusted state and local governments with national goals while using state and local laws, rules, and procedures for effective implementation. We have made major progress in moving from the micro-management often imposed by the federal bureaucracy toward performance goals and results that foster innovations by states, cities, and counties.

Our nation's "laboratories of democracy" are shining brightly all across America in crime reduction, education reform, employment practices, pollution prevention, broad-based health coverage, and multi-modal transportation. Congress gave states our version of the Safe Drinking Water Act, stopped the wholesale passage of unfunded mandates, reduced agency micro-management, and gave us new block grants in welfare, transportation, children's health, child care, drug prevention, statewide health expansions, and – just last week – education flexibility.

For all of these initiatives by Congress, we thank you and pledge our acceptance of the responsibility to exceed the national goals, as we have done in welfare reform and are already doing in education.

I am here today on behalf of the nation's governors not only to thank Congress and this committee, in particular, but also to express our growing concerns about a new trend. While we appreciate the considerable reduction in the number of unfunded mandates that force the spending of our own funds, states now often face broad preemptions that restrict access to our own funds, laws, and procedures for meeting the people's needs. We must maintain a common sense approach to government services that makes sense to the people. Only a full partnership between elected officials of all levels of government can make it work.

Devolution Revolution

The federal government has shifted much power and responsibility to state and local governments over the past few years. The Unfunded Mandates Reform Act, welfare block grants, drinking water legislation, and highway fund transfers are a few examples of legislative initiatives that have transferred authority from the federal government to state governments.

This trend, often referred to as "The Devolution Revolution," has received considerable attention from the media, academics, and, most of all, legislators eager to claim responsibility for the complementary accomplishments of shrinking the size of the federal government and empowering state and local officials.

Despite all the benefits conferred to states by devolution, the magnitude and significance of this revolution has at times been exaggerated. Many of the devolutionary initiatives are better in theory than in practice, either lacking enforcement to make them effective or imposing new burdens on states as conditions of funding. Also, while devolution has occupied center stage during the past few years, another story has unfolded in the wings with much less fanfare.

The New Problem – Preemption of State Authority

While shifting power to the states with one hand, the federal government has been busy taking power away from the states with the other. The independence and responsibility that devolution has given states in certain areas has been offset by preemption elsewhere. Even as states have benefited enormously from block grants over the past few years, the federal government has preempted state laws affecting trade, telecommunications, financial services, electronic commerce, and other issues.

Federal preemption of state laws has not occurred as the result of a malicious desire to undermine states' sovereignty. Rather, preemption has occurred as the byproduct of other issues. Unfortunately the outcome is the same for states, regardless of the motive.

To varying degrees, the federal government is often ignoring the powerful role and the constitutional rights of states in the American system of government that enables elected officials of all levels of government to best serve the people.

The rise of the new global economy, rapid advances in modern technology, and efforts toward industrial deregulation have accelerated the pace of preemption. To compete with international competitors, respond quickly to technological developments, and maximize opportunities created by deregulation, businesses seek to streamline legal and regulatory requirements. Efforts to substitute uniform national legislation for disparate state laws comprise an important part of this process and have led to federal preemption of state authority in many areas.

Businesses understandably do not want to be handcuffed by a myriad of state and local codes, statutes, and rules that prevent them from responding effectively to the rapidly changing dynamics of the domestic and world marketplaces. If industry has to be regulated at all, a standard set of federal laws and regulations presents a far more compelling alternative. However, just as federal laws and oversight serve important purposes that include preventing monopolies, raising revenues to fund national defense, and financing social security, state and local laws fulfill a variety of critical functions as well.

State and local taxing authority provides funds for education, roads, law enforcement, health care, and environmental protection. State banking, insurance, and securities laws impose capital adequacy requirements, underwriting standards, and licensing procedures that safeguard consumers' deposits and investments and protect them from fraud and abuse. State utility regulations ensure that citizens

receive high-quality water, electric, sewage, and telephone services at reasonable rates.

The important role of state laws and regulatory responsibilities should not be forgotten in the midst of the scramble to accommodate businesses and the forces of globalization, technology, and deregulation. States and their citizens stand to benefit as much as businesses from these changes, but not at the cost of continuing federal preemption of state laws.

In the aftermath of the recent elections, congressional leaders and the President have repeatedly articulated the importance of working with the nation's governors. Allowing states to continue governing in the areas that states have traditionally governed would be a good way to demonstrate commitment to a true state-federal partnership and would also provide a refreshing change.

In this new era of globalization of the marketplace, we must preserve the peoples' participation in government decisions, especially at the local level through elections. Together we recently enacted laws and regulations to improve our dialogue with Congress to stop the unilateral imposition of unfunded mandates, to focus more on the citizens' total tax burden from all governments. We have instituted prior consultation, fiscal impact statements, deference to our own laws and procedures through block grants, and limited enforcement procedures.

Current Issues of Federalism

To preserve and enhance our federal system of representative democracy through elected officials, we must recognize the long-term negative impacts of preemption.

We urge you to consider some approaches to ensure that Congress considers these negative impacts (both intended and unintended) prior to voting on bills that preempt state authority. Once state authority is taken away, it is very seldom returned. We are simultaneously asking the President to include these principles in any revision of his Executive Order on Federalism. We believe the following principles of federalism are essential to the major issues facing states today.

Principles of Federalism

- The bipartisan partnership between elected officials at all levels of government is the unique and most powerful force in our form of federalism.
- This partnership is based on early consultations over issues that affect the states.
- A legislative proposal's impact on federalism should be transparent and fully disclosed before decisions are made.
- This partnership is based on the interdependent nature of our governments that demands an attitude of the highest respect and a deference toward state and local laws and procedures that are closest to the people.
- These elements of our partnership should have some means of enforcement.

Federalism Legislation

Mr. Chairman, we know that this committee, in particular, understands and appreciates these fundamental features of federalism. You have proven it through many years of working with us – from the Intergovernmental Cooperation Act, the Intergovernmental Personnel Act, General Revenue Sharing, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, the Federal Financial Assistance Improvement Act, the Regulatory Right-to-Know Act, and the

Regulatory Improvement Act. Our thanks to every member who stands with us for enactment of each of these vital measures.

Because federalism legislation can never be perfect or finished, we are here today to encourage each of you to continue your efforts and expand your good work to this new threat to federalism. We will support your efforts to apply these principles of enforceable federalism to legislative and regulatory preemptions of state revenues, laws, and administrative procedures.

When we fail to use these federalism principles – consultation, disclosure, impact statements, deference, and enforcement – we spend even more effort to correct the problems created in areas such as telecommunications, the Internet, environmental laws, local zoning, regulatory preemption, and long-term tax policy.

Mr. Chairman, we urge you to move forward on the following bills and issue areas that are high priorities for NGA.

The Mandate Information Act (H.R. 350, S. 427). This bill would clarify that the point of order provision of the Unfunded Mandate Reform Act also applies to any cut or cap in entitlement programs (Medicaid, food stamps, child nutrition) unless the states are given "new or expanded" flexibility to manage the cut or cap. It would also be extended to mandates on the private sector of more than $100 million.

The Federal Financial Assistance Improvement Act (H.R. 409, S. 468). Both bills would require the Office of Management and Budget (OMB) to develop uniform common rules for its seventy-five crosscutting regulations. OMB must

also develop electronic filing and management of grants to reduce paperwork and uniform base data for grant applicants that could used for multiple information purposes.

Preemption Assessments. Bipartisan House and Senate staff are meeting to clarify state and local government concerns over excessive preemptions. Issues include prior notification, annual and cumulative reports, point of order, rules of construction, and possible judicial review of the process but not content. These discussions also cover federalism impact statements for executive branch preemptions and changes in the Government Performance and Results Act to require mutual agreement among federal, state, and local governments on what data are necessary to meet agency goals without federal micromanagement of state and local information needs.

The Regulatory Improvement Act (S.746). This bill would provide better prior consultation for state and local officials with federal agencies on new regulations and would require federal agencies to conduct risk assessments and benefit-cost estimates for new regulations. This is now an option.

The Regulatory Right-to-Know Act (H.R. 1074, S. 59). This bill would require an annual accounting statement of the costs and benefits of federal regulations notice and comment procedure and public disclosure of actions taken on state and local concerns.

Mr. Chairman and members of the committee, we are working with the President to formalize these same federalism principles for a revised Executive Order on Federalism.

Our message to you and to the President is the same. We need to move toward an "enforceable" federalism partnership between the elected officials of all levels of government.

We urge you to join us in a revived working partnership involving all of America in our system of government through all of its elected officials. We can best meet the single and special needs of some of the people, while also meeting the collective needs of most of the people.

Thank you very much.



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STATEMENT OF

DANIEL T. BLUE, JR.

PRESIDENT OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS

OF THE UNITED STATES SENATE

REGARDING FEDERALISM AND PREEMPTION OF STATE LAW

May 5, 1999

Mr. Chairman and Members of the Committee:

Good morning. I am Dan Blue, a member of the North Carolina House of Representatives and President of the National Conference of State Legislatures (NCSL). Today, I am presenting testimony on behalf of the nation's state legislators, of both parties and from all 50 states and the American commonwealths and territories.

I appear today also as part of the so-called Big Seven, the coalition of major state and local organizations that includes NCSL, the National Governors' Association, the National League of Cities, the Council of State Governments, the National Association of Counties, the International City/County Management Association, and the United States Conference of Mayors. The Big Seven are united in calling on Congress to pass a package of six bills dealing with state-federal relations, including the Regulatory Right to Know Act (S.59), the Regulatory Improvement Act (S.746), an Act Establishing a Congressional Office of Regulatory Affairs (S. 1675 from last year), the Federal Financial Assistance Improvement Act (S. 468), the Mandate Information Act (Section 5 of H.R. 350; also to be included in a Senate anti-preemption bill), and the Government Partnership Act (still in the drafting stage). I want to thank the several members of this committee who have agreed to sponsor or co-sponsor one or more of these important bills.

The focus of my testimony today will be on the last and in many respects the most important of these six bills, The Government Partnership Act. Passage of this bill is important because it deals with what NCSL and the Big 7 see as the most vexing of our current problems in state-federal relations. I am referring to the problem of federal preemption of state and local law.

Federal preemption of state and local law presents a very serious challenge to our constitutional system of federalism. This challenge results first from the propensity of federal courts, agencies, and the Congress to preempt state law without careful consideration of the consequences of such action. Second, it results from agencies and courts acting to preempt state laws in circumstances where it is not at all clear that Congress intended to authorize preemption.

Every year, new federal statutes, administrative rules, and court decisions preempt or displace state laws. Interest groups that have been unsuccessful in pursuing their agendas at the state level increasingly are tempted to "forum shop" and come to Washington, D.C., seeking federal preemption to reverse state legislative or court action. Too often, these interest groups are successful in undoing the work of sponsors of state legislation who may have labored for months or years to pass a bill.

The cumulative effect of such federal preemption of state law is to reduce the effectiveness of state and local governments. One of the advantages of federalism is that allows for greater responsiveness and innovation through local self-government. State and local legislatures are accessible to every citizen. They work quickly to address problems identified by constituents. The large number of state and local legislatures encourages innovation. A new policy is tested in one jurisdiction. If it works, other jurisdictions try it. If a mistake is made, it can quickly be corrected. But, if the policy jurisdiction of a state or locality has been preempted, then it cannot respond and it cannot innovate.

The most insidious consequence of preemption, in other words, is its impact in the future. Because of preemption, the policy jurisdiction of state legislatures, particularly in the area of business and economic regulation, shrinks every year. There is almost no movement in the opposite direction, in which Congress withdraws from a policy field while leaving states free to legislate. Legislation withdrawing the federal government from fields of economic regulation ordinarily includes language preempting state regulation of the affected industry.

Conversely, when the federal government imposes a new economic regulation, courts and agencies often find that the "scheme of federal regulation is so pervasive" that it has "occupied the field" thus barring even non-conflicting state regulation. Where there has been a finding of "field" preemption, state regulation will be barred even when state standards are simply more stringent than or supplementary to federal standards or even when state law merely touches tangentially on the same subject as federal legislation.

Now, if you are not a state legislator but perhaps a member of Congress, then you may ask what is the harm and indeed are there not benefits to a centralization of legislative and regulatory authority, particularly as it affects business and economic activity. Let me suggest that the harm done is considerable.

Federal regulatory agencies are not always successful in their mission of protecting the public. Moreover, over the past twenty years there has been something of an abdication by the federal government in such fields as consumer, environmental, and public health and safety protection. And, federal regulation, is often sluggish, bogged down in the elaborate federal

administrative process and able to respond only slowly to the demands of the public. Federal agencies, in other words, frequently are surpassed in performance by state officials who often can act quickly and effectively to protect their citizens.

States can act more quickly and aggressively because the structure of state administrative law is simpler and allows for swift decision-making. Also, state regulators are often more responsive to public opinion. For example, in most states, a popularly elected Attorney General is responsible for enforcement of antitrust, environmental, and consumer protection laws. State agencies, especially when they work cooperatively, also may have more law enforcement resources than comparable federal agencies. I would point in particular to the effectiveness of cooperative efforts of state attorneys general in addressing public health, consumer protection, and antitrust issues.

Indeed, it is often the effectiveness of state law enforcement and of state law remedies that results in efforts here in Washington D.C. to preempt the states. And for this reason, I believe it is important not just to state legislators but to all Americans that you pass legislation to limit federal preemption of state law.

All of us should be concerned about the cumulative and long-term effects of federal preemption of state law, for the simple reason that it undermines the effectiveness of state and local government. Justice Brandeis's saw about the states being the "laboratories of democracy" is both a cliché and a fundamental truth. There is a reason why policy innovations often arise at the state level. Americans expect their state and local governments to act quickly and efficiently

to meet their needs. They expect that state and local officials will do what it takes to solve a problem - that we will find a way. State legislators and city council members know this as well as anyone. We are the frequent recipients of the proverbial midnight phone calls from outraged constituents who have a problem and want it fixed and fixed now. Well, the truth is state legislators and city councils are not able to respond quickly and effectively if their authority has been preempted.

Let me stop and make clear at this point that I am not and NCSL is not challenging the wisdom of the Supremacy Clause. Nor am I suggesting that Congress's policy jurisdiction ought to be sharply limited. I do not suggest that we ought to return to the Articles of Confederation or that we ought to return to a pre-Civil War or pre-New Deal conception of states' rights, in which the federal government and this Congress is reduced to a passive role, unable to respond to social and economic problems with appropriate domestic legislation, which may, where there is a direct conflict, appropriately preempt state laws and regulations under the Supremacy Clause. Rather, I am making a proposal for modest changes in congressional process and federal law that, I believe, will resolve the current problem of snowballing and out-of-control federal preemption.

All we need is simple legislation that ensures three things:

- Before it acts to preempt state law, Congress will be well-informed about the implications of such action;

- Congress will establish an internal process for making it much more clear to agencies and the courts when it intends to preempt and what the limits are on the scope of such preemption; and
- Congress will provide guidance to agencies and courts, in the form of a strict rule of construction, so that court decisions and agency rules preempt state law only when there is a clear statement of congressional intent.

As a practical matter, the need for greater clarity in congressional intent goes to the heart of the problem. A review of the case law, I think, will bear me out when I say that most preemption cases do not involve an "actual conflict" between federal and state law. In other words, the cases do not ordinarily turn on explicit provisions in federal law providing for preemption or on circumstances where it is physically impossible for an individual or corporation to comply with both state and federal laws. As a 1991 report of the Appelate Judge's Conference notes: "Supremacy Clause cases typically call on the courts to discern or infer Congress's preemptive intent." The report goes on to say that: "By their very nature, implied preemption doctrines authorize courts to displace state law based on indirect and sometimes less than compelling evidence of legislative intent. This indirectness in turn suggests a greater potential for unpredictability and instability in the law."

The largest part of the preemption problem results from courts and in particular administrative agencies, in effect, reading preemption into the statute based on some theory that it is implied. For this reason, I urge this committee to pass legislation ensuring a process under the rules of the House and Senate for making it clear when Congress intends to preempt and to

provide for "a rule of construction" to guide courts and agencies in their reading of federal statutes. This should limit overly-creative theories, based for example on such loose notions of implied preemption as the pervasive nature of federal regulation, the peculiarly federal nature of the interests at stake, allegations that state law "stands as an obstacle," or the "scope of authority" granted to a federal administrative agency.

In conclusion, I want to emphasize that NCSL would like to see anti-preemption legislation move forward on a bipartisan basis. Members of both parties should support a bill that ensures a more thoughtful legislative process and that limits unjustified federal displacement of state law based on creative theories of preemption by implication. Such legislation would strengthen our system of federalism. It would also strengthen the role of Congress. Most important of all, passage of anti-preemption legislation would assure the American people that their states and local governments will continue to play a role in regulating the local economy in a way that protects the public interest.

Mr. Chairman, members of the committee, I thank you for this opportunity to testify.

To strengthen and promote cities as centers of opportunity, leadership, and governance.

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Testimony of
Clarence E. Anthony
Mayor, South Bay, Florida
President
National League of Cities

On behalf of
The National League of Cities

Before the
Senate Governmental Affairs Committee

On the
Issues & Federal State Relations

May 4, 1999

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Recycled Paper

Good morning, Mr. Chairman, my name is Clarence Anthony. I am a the mayor of South Bay, Florida, and I serve as the President of the National League of Cities, the largest and oldest organization representing the nation's cities and towns and their elected officials. I am here this morning, with my colleagues, to discuss the relationship between the federal government and state and local governments—whether we can achieve a more effective partnership to benefit our mutual constituents.

We want to begin by thanking you and the committee for holding this hearing. We believe we are in the midst of fundamental changes affecting the relationship of the federal government to state and local governments. We are grateful to you for your recognition of the importance of this issue—not just to us, but to all Americans. The changes--both those ongoing and pending in the Executive branch, on the Hill, and by regulatory agencies--could have long term impacts on state and local governments. We support fundamental changes in policy direction, many of which you have either authored or supported, to ensure the most efficient and effective possible service to our citizens and taxpayers. We appreciate your interest, and we hope to provide continuing support for changes to rebuild our federal system.

Mr. Chairman, there are some 36,000 thousand cities and towns in the United States. Most have small populations, few professional staff, and small budgets. 91 percent have populations of less than 10,000. This is a time of great change for all of them. The fiscal trends are significant with consequences for the future. For the most part, the current changes involve the assumption of significantly greater responsibilities - offloaded from the federal government - and significant federal preemption threats to historic and traditional local fiscal, land use and zoning authority.

We are in the middle of enormous and rapid changes in the federal-state-local relationships with long-term consequences for the nation's cities. The changes, if anything, were re-emphasized just one year ago by the President's Executive Order on Federalism and concurrent proposal to revoke two earlier Executive Orders that we were involved in putting together. They are highlighted by the legislation signed into law last October to interfere with the rights of states and local governments to regulate and tax sales and services provided over the Internet in the same way as all other sales and services are taxed—even though no such limitations would apply to the federal government. This legislation, adopted with minimal consideration of the consequences for state and local governments, and especially for public education, demonstrates the importance of this committee's efforts to ensure we have adequate information to inform all policy-makers prior to taking actions. In no instance have we been invited to the table even though the most significant impacts will be felt at home.

The nation is witnessing totally new emerging technologies transforming the country and its cities - perhaps in ways totally different than in previous cycles. These changes have implications for state and local revenues as they radically redefine old concepts of nexus, and as the economy moves to the future against a backdrop of state and local tax systems adopted for another era. Because today's new technologies are not as capital-intensive, or labor-intensive, or heavily industrial as the ones which used to drive the American economy, NLC adopted a proposal to create a joint endeavor with the National Governors' Association (NGA) and the National Conference of State Legislatures (NCSL) to produce a report intended to provide information to

elected state and local leaders about the changing nature of the national economy, with an analysis of the potential impacts on state and local revenues and the flexibility of current structural capacities to respond to these changes. We are following up this year with a new report looking at the impact of the global economy, deregulation, and information technology on the structure of state and local governments.

Economic, technological, telecommunication, demographic, and legislative changes are altering the federal system, perhaps beyond recognition. Our purpose last year was to examine the equity and responsiveness to changes in the economy of State and local revenue systems in today's global economy. What are the factors eroding state and local authority: federal pressure, changing demographics, globalization of the economy? Designed during the smokestack age, are state and local tax systems obsolete, inequitable, and unresponsive to changes in the economy? Have changes in the American economy, the population, and federal policies undercut the ability of states and local governments to assume greater demands and ensure equity in their revenue systems?

The most significant fiscal trend over the past twenty years has been the declining share of federal support to state and local governments, which has placed a much greater burden on current state and local taxes. Federal grants-in-aid to state and local governments averaged 21.5 percent of their total spending over the 1990-95 period. This is well below the 26.5 percent peak that occurred in 1978. Consequently, state and local governments have had to rely much more on their own tax revenue sources to generate sufficient revenue to provide services required by the public. Further, the recent trend of Congress pushing more responsibilities to state and local governments will place additional burdens on the current state-local tax structure.

· *Deregulation of the telecommunications and electric industries.* Allowing competitive entry in these regulated industries will force state and local governments to experience substantial tax shifting. Substantial hardship is expected for taxing jurisdictions that rely heavily upon existing electric generating facilities to pay local property taxes.

· *Federal tax reform.* Congressional proposals for a flat tax and a national retail sales tax would force states to undertake major revisions of their sales and personal income tax systems. Both proposals would eliminate state and municipal authority to issue tax-exempt municipal bonds—affecting more than $1 trillion in outstanding bonds used to finance virtually every school, jail, road, airport, and bridge in the nation. It would be difficult to overstate the havoc caused to the state-local tax structure if federal tax law eliminated deductions for mortgage interest, state personal income taxes, and local property taxes.

At the time our framers put together and fashioned our unique system of federalism, it was a long journey through the mud and swamps to get back and forth from Capitol Hill to the White House. Today, it is a matter of microseconds. The Internet heralds a new age that renders borders increasingly irrelevant. The most powerful trends affecting our future are international trade,

deregulation, and information technology. We believe it critical for the economy destiny of America to enter that era with a dynamic federalism that makes us partners, makes us mutually accountable to each other, and ensures synergy, rather than competition between our levels of government. We believe the bills you have authored or supported in this committee—almost all with a determined effort to work with us and develop in a bipartisan effort—are critical to success.

For that reason, this morning we join the nation's governors and leaders of other national organizations representing state and local elected leaders in making clear our commitment for creating a more enduring governmental partnership. We urge this action to provide adequate time for meaningful consultations with our levels of government with regard to proposed changes to ensure they are made with prior consultation, notice, and warning. We believe such changes and the manner in which they are made are critical with regard to the Administration's and Congress' perceptions of the balances of power between the three levels of government.

We support the Mandate Information Act, the Federal Financial Assistance Improvement Act, the Regulatory Improvement Act, and the Regulatory Right to Know Act. These are crucial steps in this new information age to making better information available to decision-makers. Thank you, Mr. Chairman. These might seem like small steps, but they are all critical.

We hold as our highest priority, not only in our association, but amongst our Big 7 organizations, a broader effort to redefine our intergovernmental partnership. For that reason, we are most pleased about your leadership on the Government Partnership Act of 1999. This bill marks, we believe, one of the most important efforts to fundamentally rethink the nature and relationship of our federal system.

Congress does have the authority to recommend and pass laws that have the effect of preempting historic and traditional rights and authority of the nation's state and local governments. Therefore, we would hope that today could be the start of a genuine commitment to mutual respect between our three levels of government.

Our members have overwhelmingly adopted halting the new trend of major federal preemption of historic and traditional state and local roles and responsibilities as our highest priority. We have witnessed a renewed effort in some parts of the Administration and in the Congress to emphasize the preeminence of the federal government with a focus on mandating uniformity. This effort proposes to reverse more than two decades of federal policy and deference to state and local authority. This morning ought to be a good opportunity to begin—all of us—to commence a serious effort to restoring authority to the levels of government closest to the people.

It has become increasingly clear that despite White House and Congressional claims of an intent to turn back greater power and authority to the level of government closest to the people, those words bear less and less relationship to actions. The preemption or taking away of historic and

essential authority of local governments over activities such as franchising, zoning, taxing, and regulating—fundamental responsibilities of state and local governments for the protection of public health, safety and property is less important to larger corporate and federal interests than uniformity and the elimination of state and local rules, laws, fees, and taxes.

Pending proposed federal preemptions, if adopted as a regulation or enacted as a new federal law, will have far-reaching consequences and impose greater liabilities on cities and towns. They would curtail the rights of citizens in cities and towns to make the key decisions about the future of their own communities.

No issue in 1999 is likely to more affect the bottom line for local budgets and services, and for the rights of citizens in cities and towns across the nation than federal efforts to preempt historic and traditional municipal authority. This is an issue city leaders will confront in the federal courts, the Congress, the Administration, and at independent federal regulatory agencies. Preemption of local authority is not just a measure that Congress and the Administration seem interested in pursuing. Federal agencies, such as the Federal Communications Commission (FCC), are also, at the request of industry, proposing rules--often under intense pressure from Congress and industry—which seek to limit local authority over franchise authority, land use and zoning, and the siting of cellular and broadcast towers.

The key aspects of the current status of federalism are:

- the trends away from federal grants to local governments and shifting to direct payments to individuals - either through entitlement benefits or tax expenditures. The federal government is making the decisions about what is in the best interest of the citizens of a community.

- there is an ongoing significant decline in federal capital investment at the local level. The disinvestment as a percent of the federal budget is aggravated by Congressional legislative threats to the ability of states and local governments to finance public capital investment through tax-exempt municipal bonds.

- the portion of the federal budget going to entitlement spending is consuming ever greater proportions, leaving less and less of the budget to invest in the nation's future. As the U.S. competes in the fields of technology and information in the global economy, disinvestment in the next generation will be reflected in local economies.

- the proportion of the federal budget going towards the elderly is leaving less and less to invest in the next generation. With juvenile crime in cities at high levels, and the nation's local economies facing major demographic shifts, disinvestment in kids could have severe consequences for the nation's cities' economies.

- while local governments have traditionally been responsible for bricks and mortar, as well as

public safety; federal actions to reduce federal responsibility and liability for welfare recipients, immigrants, and public housing tenants leave an ever-increasing liability on local governments. Increasingly, the burden transfer will aggravate disparities between local governments.

- while the trend in imposing direct federal, unfunded mandates is clearly on the decline, there has been an unprecedented increase in federal efforts to preempt state and local tax and revenue authority, threatening to undercut state and local revenue systems as we know them. Last year's and pending action by the Congress on preempting state and local authority to levy or collect existing taxes and revenues on goods and services provided over the Internet, preempting local authority with regard to the sighting of group homes, and proposals on telecommunications, federal tax reform, railroad safety, and electric utility deregulation all would have harsh consequences on municipal authority and revenues.

Federalism

We believe the recent trend of Supreme Court decisions, the Safe Drinking Water Act, the Unfunded Mandates Reform Act, and the Ed-Flex legislation demonstrate the possibilities of a more effective and efficient partnership. We note they are in profoundly a different direction that the Executive Order on Federalism, #13083, issued by President Clinton last year, or to the pending legislation in the Congress to preempt historic and traditional municipal authority. We note too that at a time when it has become more difficult for the Congress to act on environmental legislation, and issues themselves have become growingly complex, Congress unintentionally creates a greater role and authority for federal agencies to set and direct federal policy.

As we look forward to the issues that will shape the next election and the next millenium, we think, then, this is an important time to secure a system where we have greater reason to work together. Whether the issue is tax reform or electronic commerce or electric utility deregulation, any federal action can have enormous consequences for state and local governments, for our citizens and businesses, and for our taxpayers. The more those decisions are made without any clear assessment of their impact on our federal system, the more likely they are to do damage. Our federal, state, and local tax systems, for example, are so intertwined, that any of the pending major federal tax reform proposals would have harsh consequences for the roads, bridges, airports, and water and sewer lines that service every business and every home in America. Yet, until we enact the Government Partnership Act, there is no incentive to even consider a prior assessment, much less fairly analyze the consequences.

Part of the greatness of federalism has been the flexibility of our great system to allow any city, county, or state to develop new ideas and approaches to confront problems affecting Americans—the laboratory of democracy and the will of the people at each level of government in America. Through that model we have well served all our citizens. The tradition and spirit of federalism ought to—especially on this of all issues—lead us to work together to shape and

reshape the future of our country and our traditional relationships. We stand ready and look forward to an opportunity to do just that--together.

Earlier in this Administration, President Clinton's Executive Order called for more cost analysis and risk assessments for all government regulations, recognizing that federal actions can and do impose significant costs and liabilities on states and local governments. Those cost analyses and risk assessments remain to be fully implemented. But, in this age of information, they matter. Ensuring there is a mechanism to enforce the provision of this information is critical.

Now, we are engaged in attempting to negotiate a new Executive Order on Federalism. While an Executive Order is different than a federal law and carries no endorsement from the Congress, it provides direction from the President of the United States to all Cabinet agencies and departments. In this instance, once the new order were to go into effect, it would provide new guidelines for all federal officials to consider in determining when a rule, regulation, or law had "federalism implications." That is, the order would create direction for federal bureaucrats about how to address issues of municipal sovereignty, and when and under what circumstances it would be okay to preempt traditional municipal authority and responsibilities. It is about setting guidelines for when and how it is appropriate for the federal government to intrude upon or interfere with state or local authority.

We are pleased that the model set by this committee of: consultation first, joint efforts to achieve bipartisan consensus, and action which provides for pre-assessment, accountability, and enforceability.

Recommendations

We would hope that as an outcome of this set of hearings, the committee would consider the following recommendations:

- the adoption of legislation to require a fiscal impact analysis on all federal legislation and federal regulations, including regulations from independent agencies such as the Securities and Exchange Commission, the Federal Energy Regulatory Commission, and the Internal Revenue Service, on states and local governments.

- the introduction of the Government Partnership Act of 1999, to act as a follow-up to the Unfunded Mandates Reform Act of 1995.

- the issuance of a joint report on generation fiscal concerns and disparities and their implications for the federal system.

We are grateful for the opportunity to be here with you today to share our views that stem from discussions and commitments made more than 200 years ago in my city. Perhaps we ought to reconvene. We certainly believe a concerted, bipartisan effort is critical if we are to be credible in our efforts to make the government of the next century effective, efficient, and responsive to our joint constituents.

Thank you. I would be pleased to respond to any questions.

State & Local Preemption

ISSUES	LOCAL PREEMPTION	STATE & LOCAL IMPACT
FINANCE & ADMINISTRATION		
Takings	• Legislation would allow developers to pursue takings claims in federal court without first exhausting state judicial procedures.	• Would result in far greater federal court involvement in local land use disputes. Wo interfere with the resolution of essentially st and local issues within the state court syste Would encourage developers to bring suits federal court, rather than work out their disputes with local governments.
Bank Powers	• Legislation would render state legislative authority to determine state bank powers null and void.	• Could create unlevel playing field for bank branches depending upon their state of chartering - rather than the state law where they are conducting business. Could create some competitive disadvantages for home-based state-chartered banks.
State Securities Regulation	• Preempt ability of state and local governments to challenge securities fraud in state court and preempt requirement for securites dealers to make only suitable investment recommendations to pension funds and state and local governments.	• Would remove current legal rights to suitabl investment advice and right to recover damages for fraud from securities dealers.
COMMUNITY & ECONOMIC DEVELOPMENT		
Municipal Annexation	• The consolidated Farm and Rural Development Act of 1961 preempts state and local governments from providing a full range of infrastructure and services in an annexed area if a rural utility service has a protected federal loan or loan guarantee on a facility in the area.	• This makes it difficult for localities to carry o growth and economic development plans under state law.
Homeownership Campaign	• The National Conference of States on Building Codes and Standards (NCSBCS) claims that the cost and effectiveness of laws that regulate the construction of residential, commercial, public and factory buildings make building too costly. As part of HUD's Homeownership Partnership, NCSBCS is leading a working partnership to set preemptive, national building and regulatory process.	• The goal is to achieve up to a 60 percent reduction in the state and local land use, zoning and permit regulatory authority. Thi would preempt historic and traditional state and local responsibilities in the areas of lan use, zoning and building codes. However, there has been little progress with this initiative.
Fair Housing Zoning Authority	• Current law preempts municipal authority over the siting of group homes.	• Leads to federal investigations and actions when city refuses permit for group home siting.

PUBLIC SAFETY		
Juvenile Justice	• Federalization of certain juvenile crimes.	• Threatens state and local authority regardin punishment for crimes. Would allow federal and state prosecutors unprecedented opportunities to circumvent state law.
Natural Disaster Insurance	• In the name of disaster mitigation, the Federal Emergency Management Agency and the insurance industry are considering requiring in federal legislation the creation and enforcement of building codes which will reduce loss of life and physical damage resulting from catastrophic natural disasters.	• Would mandate that localities pass and enforce certain building standards, not withstanding state law.
TRANSPORTATION & COMMUNICATIONS		
Railroads	• Under the ICC Termination Act, cities and towns have been preempted from zoning authority and implementation of environment, health and safety statues.	• Does not allow local governments to carry o local laws in relation to railroad company decisions.
Tow Truck Regulation	• Under the ICC Termination Act, municipalities were told what they could regulate in relation to tow trucks.	• Courts in CA and TX have ruled that municipalities can only regulate those activiti specified under the ICC Act.
Telecommunications **Taxing Authority (A)**	• Preempts local taxes on broadcast satellite services.	• Would force higher taxes and fees on all oth businesses and residents.
Taxing Authority (B)	• Congressional proposals to preempt state and local taxes and fees on Internet transactions.	• Would force higher taxes and fees on all oth businesses and residents.
Zoning Authority: Cellular Towers	• Industry petition before the FCC that would preempt state and local authority over the siting of cellular towers and broadcast transmission facilities. Bipartisan House and Senate leaders set to introduce NLC-supported bill to give cities greater siting authority.	• Would lose ability to make land use and zoning decisions, to preserve the integrity of local neighborhoods, protect property values protect public health and safety.
Zoning Authority: Satellite Dishes	• FCC rule preempting local ordinances that restrict the use of broadcast satellite antennas.	• Interferes with local ability under state law to ensure that the siting of antennas is safe, consistent with traditional zoning, height and land use practices.
ENERGY, ENVIRONMENT, AND NATURAL RESOURCES		
Electric Utility Deregulation	• Legislation potentially jeopardizes state and local authority in many areas, including control over the public rights-of-way	• State and local governments could lose policymaking and revenue-raising capacity. Would lose ability to make decisions regardi the use of public streets, lose compensation the way of franchise fees.

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TESTIMONY OF

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BEFORE

SENATE COMMITTEE ON GOVERNMENT AFFAIRS

CONCERNING

THE STATE OF FEDERALISM

MAY 5, 1999

JACOB BURNS INSTITUTE FOR ADVANCED LEGAL STUDIES
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Thank you for the opportunity to testify about federalism--the cornerstone of our Constitution. I will first show how constitutional federalism provided the greatest charter for liberty, wealth creation, and community in political history. Second, I will outline the sad decline of federalism in the twentieth century. Third, I will offer some thoughts on reviving federalism so that it once again will promote freedom, economic growth, and social solidarity.

Federalism was the Framers' most important contribution to solving the greatest dilemma of political theory. A government needs to be powerful enough to protect liberty and property, but a government sufficiently powerful to accomplish this end is also powerful enough to oppress the liberty of its citizens and expropriate their wealth.[1] Democracy does not dissolve this dilemma: an elected ruling coalition may tax and regulate for the benefit of its members rather than in the public interest. Indeed, in a democracy concentrated groups of citizens, called factions by James Madison and special interests today, possess peculiar leverage to obtain regulation and spending for their private benefit. The resulting excessive taxation and regulation are social evils that both restrict the individual pursuit of happiness and reduce the wealth of the whole nation.

Federalism was the Framers' primary way of assuring that government would act only in the public interest. The happy

paradox of federalism is that two interlocking governments can lead to less and better governance than a unitary state. The key to the structure is to use each level of government to constrain the other. In the original Constitution the states brought the federal government into being but strictly constrained its authority by granting it only certain enumerated powers. For the Framers, the essential domestic function of the national government was limited to sustaining a free trade zone to facilitate the exchange of goods and services among the former colonies and to provide for a common currency. So circumscribed, the national government posed little threat to liberties and wealth.

The Constitution left the rest of domestic regulation to the states. Although the states were thus repositories of enormous and potentially tyrannical powers, the free movement of goods and people among them restrained their ability to use their power to oppress the liberty or extract wealth from their citizens. If the states exercised their power unwisely free citizens could take themselves or their capital elsewhere.[2] Thus the federal government was restrained by the strictly enumerated powers of the Constitution and the states were restrained by the competition that the federal government maintained through keeping open the avenues of trade and investment.[3]

Because of the limits the Constitution placed on regulation and spending for private interests, economists today have explained that the original constitutional design of a federalist free trading system was at the heart of the steady growth of the United

States that allowed it to become an economic superpower by the beginning of the twentieth century.[4] Federalism was thus a large part of what made the Constitution the most wealth producing document in human history.

Federalism not only limits government but also improves the actions government necessarily must undertake. The first way it does this is to create a marketplace for governments. By putting state governments in competition with one another it forces them to innovate in the way they deliver public goods--i.e. goods that the market and the family cannot provide. Because of this competition, useful innovations in governance are readily copied. Federalism created a "laboratory of democracy" where the successful experiments of yesterday became the sound public policy of tomorrow.

Second, federalism improved government decisions by pushing them closer to the people they affect. Groups of individuals may have different preferences for public goods. Thus human happiness will be enhanced by letting the smallest feasible unit of government deliver the public good in question. Federalism is the necessary beginning of this principle, called subsidiarity, but not the end of it. Just as federalism should force the national government to devolve appropriate decisions to the states, so too should state constitutions force states to devolve appropriate decisions to their localities.

Third, federalism increases civic responsibility. Political scientists have frequently noted that in large governments citizens

behave strategically, making it harder to gain agreement on the public goods that will improve the community. Federalism tempers strategic behavior and substitutes in its place the genuine concern of one citizen for another. As Adam Smith noted, the spirit of genuine benevolence is more likely to operate at a shorter distance.[5] The resulting fellow feeling facilitates sound and harmonious public policy.

Despite these enormous advantages, federalism has one important possible disadvantage. By multiplying the number of governments it permits officials to avoid accountability by making it harder for the public to determine which set of officials is responsible for a given governmental action. The strict enumeration of powers in the original Constitution, however, made it easier for citizens to hold state and federal official accountable for what they did in their respective spheres.

Unfortunately, today the Framers' blueprint for good government has faded. By the early part of this century pressure had developed for a more centralized structure of governance. The Sixteenth Amendment permitting a federal income tax removed a major constraint on the federal government by giving it access to almost unlimited revenues. The Seventeenth Amendment terminating the election of Senators by state legislators stripped the states of their principal institutional protectors in Congress.

In the 1930s the Supreme Court weakened federalism still further. It eliminated the remaining constitutional limitations that prevented the federal government from directly regulating

manufacturing, thereby gravely weakening regulatory competition among the states and centralizing power in Washington. The Court also abandoned its effort to limit Congress's spending power, essentially giving the federal government plenary spending authority.

The dissolution of the limitations on government embodied in federalism has had dramatic and unfortunate consequences. First, the federal government now spends domestically *seventeen* times the percent of Gross National Product as it did at the beginning of this century when federalism was strong. Without the limitations of federalism, the federal government has also imposed far more regulations on our enterprises, both large and small, than it did at height of federalism. Moreover, the marketplace for government among the states works less well because state regulatory and spending programs have relatively small effects compared to those of the federal government.

Thus, because of federalism's decline, our governments, both state and federal, spend less efficiently and tax and regulate more than they would in a system restrained by constitutional federalism. As a result, our more centralized state hinders economic growth. Less competition among the states has also led to less innovation in solving our social problems.

But even worse are the losses to our civic life. Because a more centralized system has made government less constrained and less close to the people, citizens have become more suspicious--in some cases cynical--of government. Without the constraints of

federalism it is easier for interest groups to obtain spending or regulatory transfers for themselves at the expense of others. Such a regime encourages citizens to see one another either as potential targets (of expropriation and taxation) or as threats (to their opportunities and wealth). Thus, the decline of constitutional federalism has divided citizens, embittering our political life.

If the evisceration of the constraints on the national government has robbed our constitutional system of federalism's many virtues, it has also exacerbated its potential flaw--the reduction of accountability for government officials. Since the responsibilities of the state and federal government are no longer distinct, it has become easier for federal official to avoid blame for the costs of government actions. For instance, Congress can impose mandates on the states, forcing states and their localities to spend their own money on federal objectives.

Thus federalism today is but a shadow of the Framers' structure. I now turn to the steps that are needed to reinvigorate it. The Court and Congress have been making some progress in creating as much governmental accountability as possible within the remaining structures of federalism. Recently, in *New York* v. *United States*, the Court held that the federal government cannot order the state legislature to pass state laws.[6] The decision was based in part on the Court's view that federal commandeering of state legislatures would detract from accountability, because citizens would have more difficulty in knowing whether to attribute the regulation of their liberty to the state or federal

government. In *Printz* v. *United States*, the Court expanded this holding to forbid the federal government from commandeering state officials, thus requiring the federal government to accept the responsibility for enforcing its own policies.[7]

Congress has also responded to the need for greater accountability with the Unfunded Mandate Reform Act of 1995.[8] The Act is very complex but its core feature is to require separate votes before Congress imposes new federal mandates that require the states to spend their own money. This legislation could be improved by requiring Congress to undertake the same procedure before renewing old mandates. Nevertheless it represents a useful first step for promoting accountability in this area.

The Government Partnership Act of 1999, a draft bill of Chairman Thompson, is an even more important step in restoring accountability. The bill would require Congress to provide reasons in a legislative report for its decision to preempt state law. Failure to provide such reasons would make the preempting legislation subject to a point of order. Second, the bill would declare that no legislation or regulation would preempt state law, unless it expressly so stated or if it conflicted with state law. Finally, the bill would require agencies to undertake a federalism assessment before they preempt state law. This is excellent legislation because it would force the federal government, both legislative and executive, to deliberate before preempting and preempt directly when it preempts at all. Such deliberation and clarity are hallmarks of government accountability.

This draft bill also draws support for its rule of construction and procedural requirements for deliberation from Garcia v. San Antonio Metropolitan Transit Authority.[9] In that case the Supreme Court rejected the argument that the Tenth Amendment prohibited federal minimum wage requirements from being applied to state transit operations. The Court's core holding is that Congress' power to impose its will on the states should be limited not by *ad hoc* judicial determinations balancing state and federal interests under the Tenth Amendment but by the states' participation in the national political process through the voice of its elected representatives. But states can participate in the national political process only if they know how the federal government is affecting their interests. Thus, by requiring Congress to announce publicly its intention to preempt, the Government Partnership Act helps secure more protection for the states.

Preemption that is not express also conflicts with the spirit of *Garcia,* because such preemption allows state law to be displaced indirectly by the inferences of an unelected federal judiciary. Federal accountability can be enforced only if the legislators elected from the several states are themselves required to displace state law. The abolition of non-express forms of preemption would thus mitigate the lack of legislative accountability that remains federalism's chief potential flaw.

It is a much harder task, however, to restore federalism's virtues--its hydraulic pressure for liberty and social solidarity.

Only through substantive restraints on the federal government will states and localities once again become the main repositories of policymaking that thrives through competition. Unless the federal government is constrained constitutionally from spending and regulating, interest groups will bypass the states and obtain spending and regulation on their behalf from the federal government. One-stop shopping is not only easier, but it avoids the competitive pressures that inhibit states from adopting special interest legislation.

Unfortunately, because of precedent the Supreme Court is unlikely to restore the original limitations on federal regulation and spending. A very large number of federal programs now depend on national legislature powers the Framers could not have imagined. In the *Tempting of America* Judge Robert Bork, hardly a friend of the New Deal's transformation of the Constitution, states bluntly that to overrule the Court's expansion of the enumerated powers would be "overturn much of modern government and plunge us into chaos." [10]

But members of Congress need not wait for the Court to restore federalism: they can do it themselves without upsetting current programs. Chairman Thompson took up that challenge when he proposed codifying President Reagan's executive order on federalism, E.O. 12612. That order required agencies to undertake a federalism assessment before engaging in new regulation. The federalism assessment required agencies, inter alia, to state their constitutional authority for any federal action and demonstrate

that the problem they were addressing was national rather than local in scope. Codification would prevent these laudable restraints on federal action from being repealed. It would improve agency compliance which, according to a recent draft GAO report, has been shockingly poor.

Nevertheless, while such a codification would be wholly salutary (particularly if the legislation contained provisions for judicial review), it would still not completely restore constitutional federalism. For instance, the requirement that the executive branch find constitutional authority for its actions will in most cases be readily satisfied through the expanded powers the Court has given the federal government. Moreover, Congress itself could still invade the province of the states.

Congress has also been considering proposals that would revive constitutional federalism more fully. In my view, the most promising are constitutional supermajority rules that would constrain the federal government's spending ability. The Balanced Budget Amendment was an example of this approach: it required a supermajority to raise the national debt. Just last month the House considered an amendment which would have required a two-thirds majority to raise taxes. Since either taxes or debt can be used to support more federal spending these amendments should be combined to create an effective check on the national government. As Professor Michael Rappaport and I have suggested, supermajority requirements applied directly to spending levels and to the creation of new entitlements would be simpler and more effective at

reviving federalism than supermajority requirements applied to taxes and spending.[11]

By forcing individuals to go to their states for additional spending and new entitlements, such an amendment would once again restore the benefits of the constitutional federalism of the Framers. States would be reinvigorated as the primary locus of innovation in public spending. The wisdom of their decisions would again be tested by vigorous competition. Yet a federalism reanimated by such supermajority rules on federal spending would still permit Congress to increase spending levels and create new entitlements when its action reflected a very broad national consensus.

For similar reasons, a constitutional amendment reviving the nondelegation doctrine and preventing Congress from delegating excessive regulatory authority to federal agencies would also reinvigorate federalism. The Framers bestowed national regulatory authority on the legislature rather than on the executive precisely because they knew that it would be difficult to obtain from that diverse body the consensus necessary to encroach on liberty and property. Forcing Congress itself to enact regulatory programs will have the advantage of naturally limiting the yearly agenda of possible national intrusions.[12] Individuals thus would look to their states in the first instance to obtain government regulations. Yet Congress would remain available to address truly national problems if it could obtain the consensus to pass a determinate set of regulations rather than shift responsibility for

its solution to federal agencies.

Of course, constitutional amendments may take a long time to pass. In the interim appropriate supermajority rules for spending, taxes, and debt can be adopted by legislative rule.[13] Statutory restraints on excessive federal regulation would also begin to force individuals to look more to their states. Indeed, it is important to remember that besides their other virtues regulatory reform measures always aid federalism. In restricting the scope of federal regulation, they vitalize the states in the precise areas in which federal action has been prohibited or made more difficult.

In recommending such measures, I recognize that I am asking members of this Committee and all members of Congress to give up power. I also recognize that the revival of constitutional federalism will necessarily sometimes prevent national legislators from passing legislation that they believe to be in the public interest. But constitutional government itself rests on the notion that public interest is served in the long run by maintenance of structures that through their very constraints improve governmental action. Federalism is the most important of these structures. Its preservation is thus worthy of our attention and sacrifice.

ENDNOTES

1. Barry Weingast, *The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development,* 11 ECON. J.L. ECON. ORG. 1, 1 (1995).

2. Of course, an essential flaw in the original Constitution was its failure to make all citizens free--a precondition for constitutional federalism to work for everyone. The Thirteenth, Fourteenth, and Fifteenth Amendments as well as federal legislation to enforce their promise were essential if the benefits of constitutional federalism were to be made available to all Americans.

3. Some have argued that competition among the states nevertheless has a substantial cost, because it encourages a race to the bottom in such matters as environmental regulation. I cannot agree, because I do not believe there will generally be a race to the bottom. Take for instance the case of environmental pollution. The best recent economic models suggest that where the jurisdictions do not export their pollution (i.e. where there are no substantial spillover effects beyond the jurisdiction) they are likely to provide an appropriate level of regulation for their own citizens even when they are competing to attract businesses from other jurisdictions. The practical point is that people want to work in jurisdictions with a pleasant environment. The simplified essence of the theory is that jurisdictional competition means that the cost of environmental regulations will be reflected directly in lost wages. This connection will be conducive to setting the level of regulation at a point where the marginal cost of a unit of regulation equals the marginal benefit for individuals within that jurisdiction. For an excellent discussion of these models, see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom Rationale" in Environmental Regulation,* 67 N.Y.U. L. REV. 1210 (1992). Where there are environmental spillover effects among jurisdictions, the federal government would have had authority to address them under even under the original meaning of the Commerce Clause.

4. Weingast, *supra,* at 24-28.

5. Michael W. McConnell, *Federalism: Evaluating the Framers' Design,* 54 U. Chi. L. Rev. 1484, 1493 (1987) (quoting Adam Smith).

6. New York v. United States, 505 U.S. 120 (1992).

7. Printz v. United States, 117 S. Ct. 2365 (1997).

8. Pub. L. No. 104-4 (March 22, 1995).

9. Garcia v. Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

10. ROBERT H. BORK, THE TEMPTING OF AMERICA 159 (1990). To be sure, the Court has made some modest steps in reviving the enumerated powers. Recently in United States v. Lopez, 514 U.S. 549 (1995), the Court held that Congress does not have the authority to regulate activity that is neither commercial nor crosses state lines. Because of fifty years of precedent, however, we can not expect the Court to restore the strict limitations on federal regulatory and spending authority.

11. John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MY. L. REV. 365 (1999).

12. For further discussion of the reasons to restore the nondelegation doctrine, see Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807 (1999).

13. The House of Representatives has already adopted a supermajority rule for taxes. Such rules represent a constitutional use of each House's authority to set its own rules. *See* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L. J. 483 (1995).

Testimony of **William A. Galston** on the state of federalism before the Committee on Governmental Affairs of the United States Senate, May 5 1999

Mr. Chairman, my name is William Galston, and I am a professor at the University of Maryland's School of Public Affairs. I served in the Clinton administration from January 1993 through May 1995 as Deputy Assistant for Domestic Policy, and my service in that capacity has significantly informed my understanding of federalism. However, I want to emphasize that I appear today as an independent scholar and private citizen, not as an administration representative. I should also emphasize that I have not been a party to recent controversies over particular policies and claim no special competence to address them. I am here to offer a general perspective on the historical evolution of American federalism and, to some extent, on the current state of federal-state relations. I do so in the belief that a sound understanding of constitutional principles and constitutional history can illuminate the issues you face today.

It is an honor to have been invited to testified on a matter of such fundamental importance to our nation. As you know, federalism is not a new question. Indeed, it is the first question our founders faced, first in framing our constitution and then in defending it against its many adversaries. Confronted with the manifest inadequacies of the Articles of Confederation, the founders set out to strengthen the power and authority of the central government. They did so for three reasons that have shaped our history and that remain relevant today: first, to enable the American people to promote the common defense and general welfare of the nation as a whole, as distinct from its parts; second, to build a continental market free of internal barriers to the flow of commerce; and third, to defend the rights and interests of individuals and minorities against the potential injustice of local majorities.

Not surprisingly, the framers' efforts encountered staunch resistance from state officials who feared the loss of prerogatives and power if the new constitution were ratified. In response, the supporters of the constitution formulated a theory of federalism, memorably articulated in the Federalist Papers. In the interests of time, let me briefly summarize the key points. First, the system established by the new constitution is neither a pure federation nor a pure centralized national government, but a historically unprecedented composite in which there would be concurrent jurisdiction over many matters as well as some exclusively reserved to the states or to the federal government. Second, the constitution guarantees an ongoing tension between the states and the federal government, a tension that (like the struggle among the branches of the federal government itself) helps secure the people's liberties. Third, in this ongoing struggle, the states are just as likely to expand their powers at the expense of the Union as is the national government to do so at the expense of the states. Fourth, neither party to this struggle enjoys superior wisdom, virtue, or legitimacy: both are the trustees of the people, constituted with different powers to pursue different public purposes, and ultimately answerable to the people alone.

There is no question that in practice, federal power has grown substantially over the past two centuries. This growth stems in part from classic Supreme Court decisions early in our history that established broad rather than narrow interpretations of the necessary and proper, commerce, and supremacy clauses. Federal authority was further expanded by the Civil War, which led to constitutional guarantees for the privileges and immunities of national citizenship. This growth also reflects key twentieth-century developments, such as the rise of an advanced, interdependent, industrial economy, a national economic emergency that overwhelmed the capacities of states and localities, a series of global military and security challenges, the struggle to secure in practice the rights of equal citizenship guaranteed to all Americans in theory, and the emergence of new challenges--such as environmental protection--that could not be fully addressed by states and localities acting individually. These considerations remain relevant today and argue for continued vigorous federal power in the twenty-first century.

Nonetheless, it is clear that federal authority is not and should not be unlimited. As James Madison says in Federalist 39, under the constitution the states retain "a residuary and inviolable sovereignty." Courts have argued, and no doubt will continue to argue, about the precise extent of the matters reserved to the states, but the general proposition that the framers intended a constitutional system of dual sovereignty is not open to serious doubt.

It is equally clear that from a practical standpoint, states and localities should play a key role in formulating and implementing public policy. Four considerations point in this direction. The first is the familiar idea that variations among different jurisdictions frequently make it inadvisable, or even impossible, to impose top-down, one-size-fits-all requirements. The second is the proposition, also familiar, that states and localities can serve as laboratories of democracy and that it is harmful for the federal government to place them in legislative or regulatory straitjackets that make it impossible for policy experiments to proceed. (For example, it is hard to imagine how the 1996 welfare reform bill could have been drafted without an extensive body of state and local experience on which national policy-makers could draw--experience that could not have developed without waivers from federal requirements.) Third, moving policy out to states and localities can increase opportunities for public participation and empowerment. This is especially important in an era in which so many citizens feel shut out from any meaningful say in public affairs. Finally, it is an unhappy but indisputable fact that today, public trust in national political institutions is at a low ebb; substantial devolution to states and localities may help rebuild confidence in our capacity for self-government.

Roughly speaking, the half-century after World War Two has been divided into two fundamentally different eras. In the first of these eras, for reasons stemming largely from the civil rights struggle, the states were seen as the problem and the federal government took the lead. The second era turned this assumption on its head: the federal government was labeled the problem, and devolution the solution. Each of these assumptions represented at best a partial truth.

It is only recently that our governing institutions have begun to create a new synthesis--a contemporary federalism that balances distinctive federal and state capacities and is responsive to our changing circumstances. Key examples of this progress include the Unfunded Mandate Reform Act, welfare and Medicaid reforms, and the new children's health insurance program. All of these were enacted with substantial bipartisan support in Congress and could not have succeeded without cooperation between Congress and the executive branch.

The challenge now is to maintain the progress toward this new synthesis. To this end, I would urge the following points:

1. In many areas, it will prove productive to forge a new form of federal-state partnership in which the national government establishes general public purposes and provides resources while the states decide for themselves within very broad guidelines how funds are to be employed to promote these purposes. (This is the philosophy of governance at work in the 1996 welfare reform, and also in the recently enacted Ed-Flex bill.)

2. The national government cannot retreat from its obligation to protect the rights of individual citizens, whether those rights are guaranteed by the constitution or by legislation. The discharge of this obligation will not always be consistent with the preferences of other actors in the federal system.

3. Given the continuing importance of guaranteeing a free and open national market, we must be open to the possibility that economic, technological, and social changes will require the reconsideration of long-established federal-state relations in particular sectors. Telecommunications, the Internet, banking, health care, and education are examples of areas where such rethinking may well be in order.

4. It is likely that not all the necessary changes in the federal system will point in the same direction. In some cases, the role of states and localities will be enhanced. In others, the federal government may be called upon to exercise new leadership. A uniform approach is unlikely to promote the public good in every instance.

Not every assertion of federal power is justified, but not every restriction of state and local authority is unjustified. I would therefore recommend caution in the face of any proposal that reflects a generalized presumption either for or against any particular level of the federal system.

Thank you for giving me this opportunity to present my views. I would be happy to respond to any questions you may have.

II

106TH CONGRESS
1ST SESSION

S. 1214

To ensure the liberties of the people by promoting federalism, to protect the reserved powers of the States, to impose accountability for Federal preemption of State and local laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 10, 1999

Mr. THOMPSON (for himself, Mr. LEVIN, Mr. VOINOVICH, Mr. ROBB, Mr. COCHRAN, Mrs. LINCOLN, Mr. ENZI, Mr. BREAUX, Mr. ROTH, and Mr. BAYH) introduced the following bill; which was read twice and referred jointly pursuant to the order of August 4, 1977, to the Committees on the Budget and Governmental Affairs, with instructions that if one Committee reports, the other Committee have thirty days to report or be discharged

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A BILL

To ensure the liberties of the people by promoting federalism, to protect the reserved powers of the States, to impose accountability for Federal preemption of State and local laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federalism Accountability Act of 1999".

SEC. 2. FINDINGS.

Congress finds that—

(1) the Constitution created a strong Federal system, reserving to the States all powers not delegated to the Federal Government;

(2) preemptive statutes and regulations have at times been an appropriate exercise of Federal powers, and at other times have been an inappropriate infringement on State and local government authority;

(3) on numerous occasions, Congress has enacted statutes and the agencies have promulgated rules that explicitly preempt State and local government authority and describe the scope of the preemption;

(4) in addition to statutes and rules that explicitly preempt State and local government authority, many other statutes and rules that lack an explicit statement by Congress or the agencies of their intent to preempt and a clear description of the scope of the preemption have been construed to preempt State and local government authority;

(5) in the past, the lack of clear congressional intent regarding preemption has resulted in too much discretion for Federal agencies and uncertainty for State and local governments, leaving the

presence or scope of preemption to be litigated and determined by the judiciary and sometimes producing results contrary to or beyond the intent of Congress; and

(6) State and local governments are full partners in all Federal programs administered by those governments.

SEC. 3. PURPOSES.

The purposes of this Act are to—

(1) promote and preserve the integrity and effectiveness of our Federal system of government;

(2) set forth principles governing the interpretation of congressional and agency intent regarding preemption of State and local government authority by Federal laws and rules;

(3) establish an information collection system designed to monitor the incidence of Federal statutory, regulatory, and judicial preemption; and

(4) recognize the partnership between the Federal Government and State and local governments in the implementation of certain Federal programs.

SEC. 4. DEFINITIONS.

In this Act the definitions under section 551 of title 5, United States Code, shall apply and the term—

(1) "local government" means a county, city, town, borough, township, village, school district, special district, or other political subdivision of a State;

(2) "public officials" means elected State and local government officials and their representative organizations;

(3) "State"—

(A) means a State of the United States and an agency or instrumentality of a State;

(B) includes the District of Columbia and any territory of the United States, and an agency or instrumentality of the District of Columbia or such territory;

(C) includes any tribal government and an agency or instrumentality of such government; and

(D) does not include a local government of a State; and

(4) "tribal government" means an Indian tribe as that term is defined under section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

SEC. 5. COMMITTEE OR CONFERENCE REPORTS.

(a) IN GENERAL.—The report accompanying any bill or joint resolution of a public character reported from a

committee of the Senate or House of Representatives or from a conference between the Senate and the House of Representatives shall contain an explicit statement on the extent to which the bill or joint resolution preempts State or local government law, ordinance, or regulation and, if so, an explanation of the reasons for such preemption. In the absence of a committee or conference report, the committee or conference shall report to the Senate and the House of Representatives a statement containing the information described in this section before consideration of the bill, joint resolution, or conference report.

(b) CONTENT.—The statement under subsection (a) shall include an analysis of—

(1) the extent to which the bill or joint resolution legislates in an area of traditional State authority; and

(2) the extent to which State or local government authority will be maintained if the bill or joint resolution is enacted by Congress.

SEC. 6. RULE OF CONSTRUCTION RELATING TO PREEMPTION.

(a) STATUTES.—No statute enacted after the effective date of this Act shall be construed to preempt, in whole or in part, any State or local government law, ordinance, or regulation, unless—

(1) the statute explicitly states that such preemption is intended; or

(2) there is a direct conflict between such statute and a State or local law, ordinance, or regulation so that the two cannot be reconciled or consistently stand together.

(b) RULES.—No rule promulgated after the effective date of this Act shall be construed to preempt, in whole or in part, any State or local government law, ordinance, or regulation, unless—

(1)(A) such preemption is authorized by the statute under which the rule is promulgated; and

(B) the rule, in compliance with section 7, explicitly states that such preemption is intended; or

(2) there is a direct conflict between such rule and a State or local law, ordinance, or regulation so that the two cannot be reconciled or consistently stand together.

(c) FAVORABLE CONSTRUCTION.—Any ambiguities in this Act, or in any other law of the United States, shall be construed in favor of preserving the authority of the States and the people.

SEC. 7. AGENCY FEDERALISM ASSESSMENTS.

(a) IN GENERAL.—The head of each agency shall—

(1) be responsible for implementing this Act; and

(2) designate an officer (to be known as the federalism officer) to—

(A) manage the implementation of this Act; and

(B) serve as a liaison to State and local officials and their designated representatives.

(b) NOTICE AND CONSULTATION WITH POTENTIALLY AFFECTED STATE AND LOCAL GOVERNMENT.—Early in the process of developing a rule and before the publication of a notice of proposed rulemaking, the agency shall notify, consult with, and provide an opportunity for meaningful participation by public officials of governments that may potentially be affected by the rule for the purpose of identifying any preemption of State or local government authority or other significant federalism impacts that may result from issuance of the rule. If no notice of proposed rulemaking is published, consultation shall occur sufficiently in advance of publication of an interim final rule or final rule to provide an opportunity for meaningful participation.

(c) FEDERALISM ASSESSMENTS.—

(1) IN GENERAL.—In addition to whatever other actions the federalism officer may take to

manage the implementation of this Act, such officer shall identify each proposed, interim final, and final rule having a federalism impact, including each rule with a federalism impact identified under subsection (b), that warrants the preparation of a federalism assessment.

(2) PREPARATION.—With respect to each such rule identified by the federalism officer, a federalism assessment, as described in subsection (d), shall be prepared and published in the Federal Register at the time the proposed, interim final, and final rule is published.

(3) CONSIDERATION OF ASSESSMENT.—The agency head shall consider any such assessment in all decisions involved in promulgating, implementing, and interpreting the rule.

(4) SUBMISSION TO THE OFFICE OF MANAGEMENT AND BUDGET.—Each federalism assessment shall be included in any submission made to the Office of Management and Budget by an agency for review of a rule.

(d) CONTENTS.—Each federalism assessment shall include—

(1) a statement on the extent to which the rule preempts State or local government law, ordinance,

or regulation and, if so, an explanation of the reasons for such preemption;

(2) an analysis of—

(A) the extent to which the rule regulates in an area of traditional State authority; and

(B) the extent to which State or local authority will be maintained if the rule takes effect;

(3) a description of the significant impacts of the rule on State and local governments;

(4) any measures taken by the agency, including the consideration of regulatory alternatives, to minimize the impact on State and local governments; and

(5) the extent of the agency's prior consultation with public officials, the nature of their concerns, and the extent to which those concerns have been met.

(e) PUBLICATION.—For any applicable rule, the agency shall include a summary of the federalism assessment prepared under this section in a separately identified part of the statement of basis and purpose for the rule as it is to be published in the Federal Register. The summary shall include a list of the public officials consulted

and briefly describe the views of such officials and the agency's response to such views.

SEC. 8. PERFORMANCE MEASURES.

Section 1115 of title 31, United States Code, is amended by adding at the end the following:

"(g) The head of an agency may not include in any performance plan under this section any agency activity that is a State-administered Federal grant program, unless the performance measures for the activity are determined in cooperation with public officials as defined under section 4 of the Federalism Accountability Act of 1999.".

SEC. 9. CONGRESSIONAL BUDGET OFFICE PREEMPTION REPORT.

(a) OFFICE OF MANAGEMENT AND BUDGET INFORMATION.—Not later than the expiration of the calendar year beginning after the effective date of this Act, and every year thereafter, the Director of the Office of Management and Budget shall submit to the Director of the Congressional Budget Office information describing interim final rules and final rules issued during the preceding calendar year that preempt State or local government authority.

(b) CONGRESSIONAL RESEARCH SERVICE INFORMATION.—Not later than the expiration of the calendar year beginning after the effective date of this Act, and every

year thereafter, the Director of the Congressional Research Service shall submit to the Director of the Congressional Budget Office information describing court decisions issued during the preceding calendar year that preempt State or local government authority.

(c) CONGRESSIONAL BUDGET OFFICE REPORT.—

(1) IN GENERAL.—After each session of Congress, the Congressional Budget Office shall prepare a report on the extent of Federal preemption of State or local government authority enacted into law or adopted through judicial or agency interpretation of Federal statutes during the previous session of Congress.

(2) CONTENT.—The report under paragraph (1) shall contain—

(A) a list of Federal statutes preempting, in whole or in part, State or local government authority;

(B) a summary of legislation reported from committee preempting, in whole or in part, State or local government authority;

(C) a summary of rules of agencies preempting, in whole or in part, State and local government authority; and

(D) a summary of Federal court decisions on preemption.

(3) AVAILABILITY.—The report under this section shall be made available to—

(A) each committee of Congress;

(B) each Governor of a State;

(C) the presiding officer of each chamber of the legislature of each State; and

(D) other public officials and the public on the Internet.

SEC. 10. FLEXIBILITY AND FEDERAL INTERGOVERNMENTAL MANDATES.

(a) DEFINITION.—Section 421(5)(B) of the Congressional Budget Act of 1974 (2 U.S.C. 658(5)(B)) is amended—

(1) by striking "(i)(I) would" and inserting "(i) would";

(2) by striking "(II) would" and inserting "(ii)(I) would"; and

(3) by striking "(ii) the" and inserting "(II) the".

(b) COMMITTEE REPORTS.—Section 423(d) of the Congressional Budget Act of 1974 (2 U.S.C. 658b(d)) is amended—

(1) in paragraph (1)(C) by striking "and" after the semicolon;

(2) in paragraph (2) by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(3) if the bill or joint resolution would make the reduction specified in section 421(5)(B)(ii)(I), a statement of how the committee specifically intends the States to implement the reduction and to what extent the legislation provides additional flexibility, if any, to offset the reduction.".

(c) CONGRESSIONAL BUDGET OFFICE ESTIMATES.—Section 424(a) of the Congressional Budget Act of 1974 (2 U.S.C. 658c(a)) is amended—

(1) by redesignating paragraph (3) as paragraph (4); and

(2) by inserting after paragraph (2) the following:

"(3) ADDITIONAL FLEXIBILITY INFORMATION.—The Director shall include in the statement submitted under this subsection, in the case of legislation that makes changes as described in section 421(5)(B)(ii)(I)—

"(A) if no additional flexibility is provided in the legislation, a description of whether and

how the States can offset the reduction under existing law; or

"(B) if additional flexibility is provided in the legislation, whether the resulting savings would offset the reductions in that program assuming the States fully implement that additional flexibility.".

SEC. 11. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect 90 days after the date of enactment of this Act.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 4, 1999

Mr. L. Nye Stevens
Director, Federal Management
and Workforce Issues
General Government Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Stevens:

This responds to your office's request for the views of the Office of Management and Budget (OMB) on the draft statement by the General Accounting Office (GAO) on "Federalism: Implementation of Executive Order No. 12612 in the Rulemaking Process." We appreciate your seeking our views.

Our most serious concern with the draft report is that it ignores entirely the primary vehicles for improving Federal-State consultation in the past six years: the Unfunded Mandates Reform Act (UMRA) and President Clinton's Federalism Executive Order (E.O.) No. 12875 ("Enhancing the Intergovernmental Partnership"). Instead the draft focuses on counting the number of "federalism assessments" that agencies prepared under another Executive order (E.O. 12612), an E.O. promulgated by a previous Administration that was not implemented to any significant extent, either by that Administration or its successors.

Since President Clinton directed agencies to take into account the interests of State and local governments back in 1993 under E.O. 12875, we believe the critical issue is "How and how well have these Federal agencies consulted?" Each year, we provide to the Congress an assessment, in OMB's annual UMRA report. The UMRA reports provide a summary of the large number of consultations that Federal agencies have had with State and local governments and a description of the role those consultations played in the development of individual rules. They show that Federal agencies take seriously the concerns of State and local governments, and have consulted extensively with them. Enclosed are copies of OMB's UMRA reports for 1996, 1997, and 1998 (OMB's report for 1999 will be issued soon).

Unfortunately, the draft GAO statement incorporates none of the information from the UMRA reports. It focuses only on E.O. 12612, which results in conclusions that are incomplete and misleading.

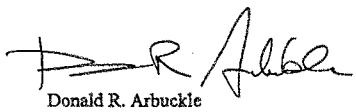
Even when the draft GAO statement is viewed within the narrow confines of E.O. 12612 alone, the picture is still incomplete.

First, the draft statement focuses on "federalism assessments" that were prepared from April 1996 through December 1998, and does not even ask how many "federalism assessments" were prepared during comparable periods in prior Administrations. The recollection of OMB staff here during that time is that few "federalism assessments" were prepared during the Reagan and Bush Administrations. Second, the draft statement does not take into account the fact that the time period under GAO review was precisely the period when the Administration was reviewing and revising E.O. 12612, resulting in the issuance of a revised E.O. in May 1998 (E.O. 13083, whose operation was then suspended). It is not surprising that agencies were not focused on implementing the Order knowing that it was soon to be revised.

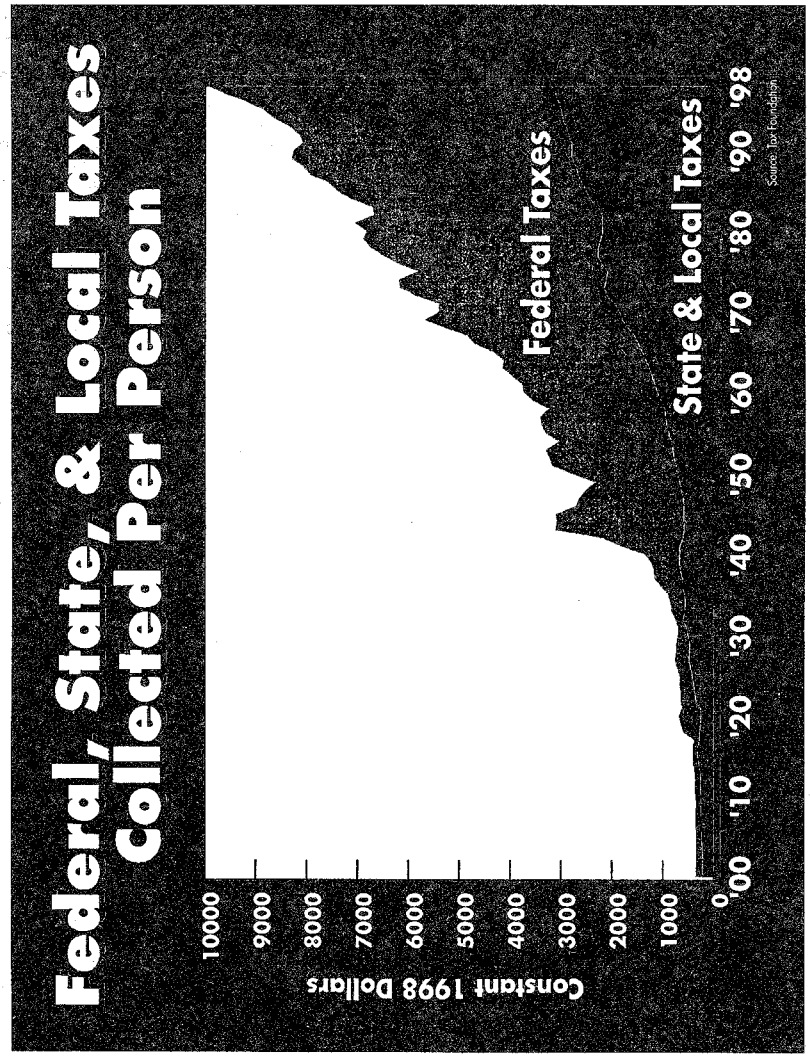
The President has stated many times how central and important is the effective functioning of the Federal relationship. We believe that Federal agencies take seriously the concerns of State and local governments, and have consulted extensively with them. We hope you will revise the draft to include the information thus far omitted, and thereby give the Congress the full presentation this important issue deserves.

Thank you again for this opportunity to comment on the draft GAO statement.

Sincerely,



Donald R. Arbuckle
Acting Administrator
and Deputy Administrator
Office of Information
and Regulatory Affairs


Federal, State, & Local Taxes
Collected Per Person
Constant 1998 Dollars
10000
9000
8000
7000
6000
5000
4000
3000
2000
1000
0
'00
'10
'20
'30
'40
'50
'60
'70
'80
'90
'98
Federal Taxes
State & Local Taxes
Source: Tax Foundation

Statement of
Adam D. Thierer
Walker Fellow in Economic Policy
The Heritage Foundation
Washington, DC

Senate Governmental Affairs Committee
Hearing on Federalism

May 5, 1999

Today's Senate Government Affairs Committee hearing on the state of federalism in the United States is an important and long overdue investigation into the current status of America's constitutional structure of government. Throughout this century, and especially since the time of the New Deal, there has been seemingly little political interest in revisiting and seriously debating the underlying economic, legal, philosophical, and Constitutional origins and effects of America's federalist system of governance. Many politicians, interest groups, academics, legal scholars, and even judges have somewhat casually accepted the growth of the national government relative to that of the states and localities. Some even suggest that the expansion of federal authority is a natural outgrowth of an expanding, changing nation and therefore should simply be accepted as the norm. In other words, in the minds of many, federalism long ago ceased to be the subject of much serious intellectual discourse, debate, or interest.

The Heritage Foundation has long believed this thinking to be as unfortunate as it is misguided. Federalism, as framed by the Founders, is needed more today than ever before. Far from being an outdated relic of a bygone age, our Founder's federalist model represents the ideal system of governance for the pluralistic and diverse political climate and culture found in modern America.

The constitutional structure embodied in our federalist system of governance was viewed as the greatest guarantor of liberty and freedom when the Constitution was penned over 200 years ago. With its numerous checks and balances, incentives for political experimentation and creativity, and protections of individual liberty, the American system of constitutional federalism became a model for countless other nations in subsequent years, which all yearned to achieve what America had.

It is sad and somewhat remarkable, therefore, to consider just how far America has strayed from our Founder's first principles when it comes to federalism. Today the federal government is larger and more powerful than ever before. It collects more taxes, regulates more industries and individual endeavors, and usurps the power of state and local governments on an unprecedented scale. By almost ever conceivable statistical and anecdotal measurement one can think of, the power of the federal government has grown, and grown considerably, throughout this past century.

At one time in American history, such a development would have been incomprehensible. Indeed, as Supreme Court Justice Sandra Day O'Connor aptly noted in *New York v. United States* (1992): "The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities."

Sadly, the state of affairs has grown so grim that proponents or even apologists for the growth of the national government relative to the states can seemingly name no limits to the boundaries of the federal government's all-encompassing power. For example, in the important recent federalism case *United States v. Lopez* (1995), Justice Clarence Thomas recalls in his concurring opinion that, "When asked at oral argument if there were any limits to the Commerce Clause, the Government was at a loss for words. Likewise, the [government's] principle dissent insists that there are limits, but it cannot muster even one example." In other words, in modern America, federal power is boundless; state power is limited.

This is precisely the opposite of what the Founding Fathers intended. No less an authority that James Madison — the chief architect of the Constitution — has articulated this point so clearly when he noted in *Federalist #39* and *#45* that, "[Federal] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residual and inviolable sovereignty over all other objects.... The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

It could not be any more clear than that. Yet, regardless of what the Founders said and intended, their federalist system has been neglected, ignored, abused, and corrupted throughout this century. And the consequences of this have been regrettable, albeit quite predictable. As the federal government has grown larger and usurped an ever-expanding range of powers and responsibilities from the States and the people, Washington has become subject to the corrupting influence of special interests; divided by the very factions that the Founders so feared. This, in turn, has fed the national government's incessant appetite for profligate spending on a stunning array of programs that the federal government has no business administering in the first place. As a consequence, taxpayer money has been squandered and the vitality of our once vigorous and politically innovative federalist system has been drained.

Today, therefore, the need to revitalize our federalist system should be obvious. This process should be undertaken because citizen choice, jurisdictional competition, and "voting with one's feet," can make a real difference in terms of revitalizing the American republic. The reinvigoration of federalism can provide a renaissance in public policy making that allows citizens to resolve social and political disputes in a much more satisfactory manner. Most importantly, the restoration of the Founder's federalism can once again secure the rights of the people and ensure the national government returns to its proper Constitutional confines.

By choosing to highlight these issues at today's hearing, the Senate Governmental Affairs Committee has wisely decided to embark on what will hopefully be the first step in an ongoing effort to resuscitate the Founding Father's original system of constitutional federalism. For the Committee's consideration, I have attached for the record a recent Heritage Foundation study I have authored entitled, "Federalism Reform: Seven Options for Congress," which provides a condensed list of federalism reform options that the Committee might wish to entertain to get this process rolling.

Additionally, copies of a recent Heritage Foundation book I authored, *The Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Technological Age*, have been distributed to every Senator's office and additional copies can be made available upon request. I thank the Committee for receiving my comments and applaud the Committee's members, and especially Committee Chairman Fred Thompson, for undertaking this important inquiry.

The Heritage Foundation
Backgrounder

No. 1245 January 27, 1999

FEDERALISM REFORM: SEVEN OPTIONS FOR CONGRESS[1]

ADAM D. THIERER

Last May, the White House ignited a surprising political firestorm when it released Executive Order (E.O.) No. 13083[2] on federalism policymaking. As public awareness of the content of this executive order grew, it triggered a unique series of events that placed the Clinton Administration on the defensive and forced it to acknowledge and, ultimately, to abandon the new form of federalism it had tried to establish through this executive order.

After many years of neglect, Washington's policy elites once again are talking about the importance of federalism in the American system of constitutional governance. Federalism—which uniquely determines the relationship between and among the jurisdictions of the federal, state, and local governments—is perhaps most succinctly described in the words of President Ronald Reagan's Domestic Policy Council Working Group on Federalism: a "constitutionally based, structural theory of government designed to ensure political freedom and responsive, democratic government in a large and diverse society."[3] It has long been considered by many to be the ultimate guardian of liberty within the American Republic.

The reaction to President Bill Clinton's surprising executive order helped to forge a diverse and bipartisan alliance among Members of Congress, state and local officials, interest groups, legal scholars,

Produced by
The Thomas A. Roe Institute
for Economic Policy Studies

Published by
The Heritage Foundation
214 Massachusetts Ave., N.E.
Washington, D.C.
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http://www.heritage.org

1. Portions of this paper are adapted from the author's recently published book on federalism. See *The Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Technological Age* (Washington, D.C.: The Heritage Foundation, 1999), pp. ix–xiv; 40–46; 119–143.
2. President William J. Clinton, Executive Order No. 13083, "Federalism," May 14, 1998; see *Federal Register*, Vol. 63, No. 96 (May 19, 1998), pp. 27651–27655.
3. "The Status of Federalism in America," *A Report of the Working Group on Federalism of the Domestic Policy Council*, November 1986, p. 1.

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political commentators, and average citizens who believed that E.O. 13083 violated certain sacred tenets of the U.S. Constitution on the proper division of powers for the various levels of government. This alliance signaled a renewed interest in Washington, and among the population at large, in examining how best to reinvigorate and protect the Founding Fathers' original system of federalism. In fact, the renewed focus on protecting federalism eventually forced President Clinton to withdraw his executive order just a few months after issuing it.

Sadly, however, President Clinton appears not to have learned any lesson from last year's federalism fight. In his recent State of the Union Address, he showcased a litany of new federal programs that ignore the proper constitutional balance of powers by promoting even more federal intrusion into matters that are best dealt with by state or local governments.

As the 106th Congress—the last Congress of the 20th century—begins its important work, it must examine the system of government that has developed over the past decade and delineate areas in which reform is needed to protect the Framers' dynamic system of federalism for the future. Legislators must establish firm principles and strategies to reinvigorate federalism, and then devise a timetable to accomplish these goals in the near and long terms. If the 106th Congress succeeds in doing so, this accomplishment may stand as its most important legacy to future generations.

A CONFLICT OF VISIONS: RESTORING VS. REMAKING FEDERALISM

President Clinton's Executive Order No. 13083 on federalism outlined a set of new "Federalism Policymaking Criteria" that would have given federal bureaucrats and regulators generous leeway to intervene in the affairs of the states or to pass uniform, preemptive federal rules under a remarkable variety of circumstances. For example, the executive order delineated that federal action could be justified:[4]

- "When decentralization increases the costs of government thus imposing additional burdens on the taxpayer";
- "When States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other States";
- "When placing regulatory authority at the State or local level would undermine regulatory goals because high costs or demands for specialized expertise will effectively place the regulatory matter beyond the resources of State authorities"; or
- "When the matter relates to Federally owned or managed property or natural resources, trust obligations, or international obligations."

Perhaps more important, E.O. 13083 proposed the revocation of an earlier executive order on federalism issued by President Ronald Reagan in 1987, No. 12612.[5] E.O. 13083's open-ended, expansionary policymaking criteria are very different from President Reagan's, which placed substantive limits on the ability of federal officials to intervene in the affairs of the states and the people. For example, President Reagan's E.O. 12612 notes that

> Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope.[6]

4. Executive Order 13083, *op. cit.*
5. President Ronald Reagan, Executive Order No. 12612, "Federalism," October 26, 1987; see *Federal Register,* Vol. 52, No. 210 (October 30, 1987), pp. 41685–41688.
6. *Ibid.*

NOTE: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

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Within these two orders are two distinct visions of federalism. President Reagan's vision stressed, above all, adherence to the original intentions of the Founders and the language of the Constitution regarding the federal government's limited, enumerated powers, and it promoted a healthy respect for the benefits of state and local autonomy. President Clinton's vision, on the other hand, is based on a new federalism paradigm that calls for greater constitutional malleability and an acceptance of the frequent need for federal intervention to alleviate any ill.

THE PUBLIC REBUKE OF E.O. 13083

President Clinton's federalism manifesto did not initially generate a great deal of media or public attention because the White House quietly released E.O. 13083 in early 1998 while the President was out of the country. But, by mid-summer, a growing number of Washington policymakers, state and local officials, and national organizations had become sufficiently concerned about its potential effects to begin asking the Clinton Administration to explain its new thinking on federalism.

Their concerns culminated in a hearing on July 28, 1998, in the House Government Reform and Oversight Subcommittee on Regulatory Affairs. During this hearing, the Clinton Administration was castigated uniformly for its decision to abandon the fairly non-controversial Reagan executive order and impose the new federalism guidelines that appeared to grant the federal government unlimited policymaking authority over the states.

Several Members of Congress condemned President Clinton's new federalism guidelines and introduced legislation to force him to revoke his executive order. For example, a Sense of the Senate Resolution introduced by Senator Fred Thompson (R–TN), which encouraged the President to revoke his order, passed by unanimous consent in late July. Dissenters in Congress were joined by representatives of many well-respected state and local organizations, including the National Governors' Association, the National Conference of State Legislators, the United States Conference of Mayors, the National League of Cities, and the National Association of Counties.

On August 5, the White House finally succumbed to this intense pressure and announced it would suspend the proposed executive order "in order to enable full and adequate consultation with State and local elected officials, their representative organizations, and other interested parties."[7] At least temporarily, the bipartisan alliance of those who understood the Constitution's firm limits on the scope of federal power had prevailed.

THE NEED FOR REFORM

The temporary victory for the ardent supporters of a limited, constitutional government was largely symbolic. There remains a strong and continuing need to formulate comprehensive federalism reforms to revive, reinvigorate, and protect the Founding Fathers' delicate balance of powers so carefully delineated in the Constitution.

Restoring the proper balance of power between the states and the federal government will not be easy, but it can and must be done. Several decades of legislative abuse and judicial neglect have left the Founders' federalist system in disarray, largely because, as Supreme Court Justice Sandra Day O'Connor observed,

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.[8]

7. President William J. Clinton, "Suspension of Executive Order 13083," White House, Office of the Press Secretary, August 5, 1998.

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Table 1 B1245

Seven Practical Steps for Congress to Reinvigorate Federalism

Short-Term Federalism Reform Strategies	
Objective: Establish clear and firm federalism policymaking guidelines for Congress and executive branch agencies.	Strategy #1: Codify the Federalism Policymaking Criteria in Executive Order No. 12612.
Objective: Provide adequate consideration of and justification for legislation with potential federalism implications.	Strategy #2: Mandate that Members of Congress identify the constitutional basis of proposed legislation and debate the merits of that authority.
Mid-Term Federalism Reform Strategies	
Objective: Curtail the use of preemptive federal statutes and regulations put forth under a loose reading of the Commerce Clause.	Strategy #3: Limit the ability of the federal government to preempt state or local laws under the Commerce Clause, unless clear constitutional justification exists.
Objective: Curtail the power of cabinet departments and independent regulatory agencies to preempt state and local governments.	Strategy #4: Enact anti-delegation legislation that ends the unconstitutional transfer of law-making authority from the legislative to the executive branch.
Long-Term Federalism Reform Strategies	
Objective: Rectify the imbalance between the states and the federal government regarding how amendments to the Constitution are proposed.	Strategy #5: Allow the states to propose amendments to the Constitution without having to call for a constitutional convention.
Objective: Rectify the accountability problem created by the adoption of the Seventeenth Amendment, which stripped the states of their power to elect Senators to Congress directly.	Strategy #6: Allow states to hold their congressional representatives accountable by convening their congressional delegations when egregious federal mandates and policies are being imposed.
Objective: Identify additional steps that would provide the states with a firm check on federal preemption and conscription efforts.	Strategy #7: Give states supermajority veto power over federal legislation or regulations that preempt their authority or require them to administer federal programs or rules.

Constructive federalism reform strategies are available to correct this imbalance (see Table 1). These strategies should be prioritized according to those that could be implemented in the short term (that is, within the next six months to two years) and those that should follow in the mid- or long term (that is, from two to five years).

8. Justice Sandra Day O'Connor, *New York v. United States*, 505 U.S. 144, 157 (1992).

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It is important to note that most of these strategies are not new ideas; indeed, the principles behind them date back to the age of the founding of the American Republic. Unfortunately, the principles and protections in the original federalist system of governance established in the Constitution have been eroded by a century's worth of corrupt jurisprudence and unwarranted advances by federal legislators and regulators. And, with the notable exception of the passage of the Unfunded Mandates Reform Act (UMRA) of 1995, efforts to revive and reinvigorate these principles have not been forthcoming. The reform objectives and strategies set out here are steps in the proper direction, are supported by numerous national groups, and are vital if Congress wishes to reestablish the centrality of federalism for a vigorous constitutional republic.[9]

SHORT-TERM FEDERALISM REFORM STRATEGIES

The 106th Congress faces a crowded legislative calendar that may be abbreviated further by the upcoming presidential election cycle. With this in mind, Members of Congress should dedicate the next few months to advancing federalism reforms that uphold and protect the constitutionally delineated balance of power. Fortunately, two simple but important reform strategies can be introduced immediately that would make this possible:

Strategy #1: Congress should codify President Ronald Reagan's Federalism Policymaking Criteria in Executive Order No. 12612.

To guide the process of assessing jurisdictional responsibility and limiting the role of the federal government to tasks that are permissible under the Constitution, Congress would be wise to codify President Reagan's excellent federalism policymaking criteria contained in E.O. 12612, which was issued on October 26, 1987.[10] This action would establish clear and firm guidelines for Congress and executive branch agencies to follow when they set about crafting new public policy with federalism implications.

E.O. 12612 called for strict adherence to constitutional principles. It directed cabinet agencies and executive branch offices to

> restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies.

In Section 3, executive branch agencies were ordered to follow a strict set of Federalism Policymaking Criteria[11] "when formulating and implementing policies that have federalism implications." (See Appendix for the full text of E.O. 12612.) For example:

- "Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the

9. Groups representing state and local interests, such as the American Legislative Exchange Council, the National Governors' Association, the National Conference of State Legislatures, the Council of State Governments, and the State Legislative Leaders Foundation, have endorsed variations of these recommendations. For a summary of the principles and reforms of federalism they support, which were agreed on in a summit on federalism in October 1995, see Charles J. Cooper and David H. Thompson, "The Tenth Amendment: The Promise of Liberty; Strategies to Restore the Balance of Powers Between the Federal and State Governments," American Legislative Exchange Council *The State Factor*, Vol. 22, No. 7 (October 1996).

10. Executive Order 12612, *op. cit.*

11. See James Miller III, Office of Management and Budget, "Implementation of Executive Order No. 12612, Federalism," *Memorandum for the Heads of Executive Departments and Agencies*, December 16, 1987; and President George Bush, "Federalism Executive Order," *Memorandum to the Heads of Executive Departments and Agencies*, February 16, 1990.

necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented.

- "With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.
- "Executive departments and agencies shall: (1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States. (2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards. (3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards."

Although widely ignored by most regulatory agencies then and now, President Reagan's executive order was an important acknowledgment of the federal government's overwhelming power relative to the states. On a more practical level, E.O. 12612 provides a roadmap for returning to the Founders' framework by encouraging federal officials to work more closely with the states.

It is fortunate, therefore, that the Clinton Administration's attempt to revoke President Reagan's executive order was repelled successfully by a bipartisan effort. It is important that the criteria embodied in E.O. 12612 be codified so that future Administrations cannot thwart the spirit of the Constitution. For example, codification of E.O. 12612 would require "Federalism Assessments" of any proposed rule that might have substantive federalism implications. These assessments would be reviewed by the White House's Office of Management and Budget (OMB) and by Congress to ensure that federal agencies abide by the Constitution and respect the autonomy of state and local governments.

Statutory codification of Reagan's Federalism Policymaking Criteria could take many forms. Congress, for example, could take the language of the executive order and codify it as law without significant changes or accompanying statutory language. This approach was taken in two bills that were proposed during late summer 1998: the Federalism Enforcement Act of 1998 (S. 2445) introduced by Senator Fred Thompson and several cosponsors, and the Federalism Act of 1998 (H.R. 4422) introduced by Representative James Moran (D–VA) and cosponsors from both parties. Both bills, despite minor differences regarding the inclusion of judicial review language, relied heavily on the language of E.O. 12612.

A second option would be to amend existing statutes that deal with jurisdictional matters, intergovernmental affairs, or regulatory policymaking. Two legislative vehicles that could be amended to include the federalism guidelines and protections in E.O. 12612 are the UMRA[12] and the Congressional Review Act (CRA), which was implemented as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996.[13]

The UMRA was one of the first pieces of legislation enacted by the 104th Congress. It requires the Congressional Budget Office (CBO) to estimate the costs of proposed mandates on state and local governments, and allows a point of order to be raised against any bill or joint resolution that lacks such an estimate or results in direct costs to state and local governments of more than $50 million.

The UMRA has been helpful in allowing Members of Congress to deliberate more carefully

12. Public Law No. 104–4, March 22, 1995.

13. Public Law No. 104–121, March 29, 1996. The Congressional Review Act is contained in Subtitle E of Title II of the Small Business Regulatory Enforcement Fairness Act of 1996.

their legislative proposals. CBO cost estimates have helped Congress to drop costly proposals or modify them to reduce their costs.[14] The UMRA is an important existing vehicle that provides statutory protection against federal intrusion into state and local matters. It could be improved, however: For example, its reach should be extended to existing statutes and mandates.[15] And its new and existing requirements should be strengthened by including E.O. 12612's Federalism Policymaking Criteria within Title II and stronger judicial review language within Title IV. With these improvements, the UMRA would give Congress and the courts a mechanism to demand the strict federalism accountability of federal officials.

The CRA provides a mechanism by which Congress can review and disapprove final rules issued by federal regulatory agencies. It also requires agencies to estimate costs associated with new rules and provide interpretations or explanations regarding the need for these rules. Yet, as of today, Congress has failed to use the CRA to rein in overzealous federal regulators.[16] In fact, it has failed to reject *any* new rules under the CRA, despite an onslaught of expensive new regulatory proposals from federal agencies in recent years.[17] Nonetheless, the CRA has the potential to become an important tool in future congressional efforts to control federal regulatory activity. Amending the CRA to include President Reagan's Federalism Policymaking Criteria would create another procedural impediment to federal preemption. At the very least, Congress would be obligated to review federal rules for their federalism implications and strike down those that do not abide by the Constitution.

Regardless of which statutory vehicle Congress chooses to codify federalism policymaking guidelines, it is vital that stronger judicial review language be included. Such language is an essential component of reform because it would establish another enforcement avenue. That is, the inclusion of judicial review language within such legislative reforms would encourage the courts to become institutional defenders of federalism and a bulwark against the unconstitutional overreach of the other branches of government.

To accomplish this task, Congress might consider taking advantage of the judicial review language in the SBREFA. The provisions contained in Section 611 of the SBREFA could be adopted and slightly modified to give the courts the power to review agency rules that potentially violate newly enacted Federalism Policymaking Criteria. The courts could decide if such rules should be struck down as unconstitutional, or simply remand the rule to the agency for review and revision until it complied with the new guidelines and protections.

Unfortunately, these judicial review provisions have only limited applicability under SBREFA and do not apply to the CRA, which is attached as a subtitle to that statute. Therefore, when Congress attempts to craft new federalism policymaking guidelines, judicial review provisions should be broadened to cover any legislative and regulatory activities with potential federalism implications.

Strategy #2: Congress should be obligated to identify the constitutional basis of each of the statutes it considers and allow debate on the merits of that asserted authority.

14. See Angela Antonelli, "Promises Unfulfilled: Unfunded Mandates Reform Act of 1995," *Regulation* No. 2 (1996), pp. 46–54.

15. *Ibid.*

16. See Angela Antonelli, "Needed: Aggressive Implementation of the Congressional Review Act," Heritage Foundation F.Y.I. No. 131, February 19, 1997; and Susan E. Dudley and Angela Antonelli, "Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight?" *Regulation*, Fall 1997, pp. 17–23.

17. See Angela Antonelli, "Two Years and 8,600 Rules: Why Congress Needs an Office of Regulatory Analysis," Heritage Foundation *Backgrounder* No. 1192, June 26, 1998.

This action would ensure that Congress provided adequate consideration and justification for any legislation with potential implications for federalism.

Many bills, committee reports, and other congressional documents include a standard boilerplate statement concerning how and why federal intervention in the given field is justified. Yet, as James Madison—one of the key architects of the Constitution—argues in *Federalist* No. 39, "[Federal] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[18] And in *Federalist* No. 45, Madison notes, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[19]

It is clear from the Founders' writings that the clauses and phrases of the Constitution were not intended to be vague, open-ended mechanisms that could be used to justify the exercise of federal authority over any conceivable form of human activity. Instead, these clauses and phrases were to act as policymaking parameters or boundaries on federal activity.

Therefore, to reinvigorate and protect the Constitution's original form of federalism, policymakers must put in place firm procedural requirements that obligate Members of Congress to cite the clause or section of the Constitution under which their proposed legislation is justified.

Such a proposal was introduced in the House by Representative John Shadegg (R–AZ) in 1998, and it is scheduled to be reintroduced again this year. The Enumerated Powers Act would require that

> Each Act of Congress shall contain a concise and definite statement of the constitutional authority relied upon for the enactment of each portion of that Act. The failure to comply with this section shall give rise to a point of order in either House of Congress. The availability of this point of order does not affect any other available relief.

In a 1996 *Journal of Commerce* article, Senator Spencer Abraham (R–MI) aptly summarizes the reasons such a reform is needed:

> The requirement that every bill include a statement of Constitutionality will perform three important functions. First, it will encourage us to pause and reflect about where the law we are considering enacting fits within the Constitutional allocation of powers between the federal government and the States. A statement of Constitutional authority also will put Congress' view of its authority on the record for the people to judge. This will spur further useful reflection on our part and open up the possibility of conversation with and among the people on the subject of federal powers. Finally, such a statement will help the courts evaluate the legislation's constitutionality. Legislation that falls within our enumerated powers will more likely be upheld if it contains an explicit explanation of its Constitutional authority. As important, we will be less likely to enact laws or regulations that overstep proper Constitutional bounds. And if the statement of constitutional authority does not stand up to scrutiny, both the courts and the people will find it easier to hold us accountable.[20]

But legislators might want to go beyond this relatively straightforward reform and require actual oral debate on the House and Senate floors over the constitutional justification of each act under consideration. It is routine today for

18. Clinton Rossiter, ed., *The Federalist Papers* (New York, NY: NAL Penguin, 1961), p. 245.

19. *Ibid.*, p. 292.

20. Senator Spencer Abraham, "Downsizing Federal Authority," *Journal of Commerce*, February 27, 1996, p. 8A.

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Members of Congress to dispense with the reading of the bills on which they are about to vote. Far too often, federal legislators have little to no idea of what new federal programs or powers are contained in the legislation they are considering. Worse, very little consideration goes to what power in the Constitution authorizes those acts of Congress. Clearly, legislators should devote at least five or ten minutes of floor time to justify the statutes they propose. Points of order then could be raised against bills that were not subjected to such floor debate.

Other variants of this type of federalism reform option are possible, but regardless of how such a reform is structured, the important purpose is that it perform an important educational function for Members of Congress and the public. Such requirements will remind legislators and voters alike that the powers of the federal government are limited and enumerated under the Constitution. Furthermore, by requiring that greater justification be put forward in the future, legislators and citizens will become more familiar with the Constitution, too. As a consequence, legislators and citizens will better understand the constitutional balance of powers and become more aware of the efforts of some to manipulate or abuse the language of the Constitution in order to expand the powers of the federal government.

These reforms represent the bare minimum that Congress should do in the short term to reinvigorate federalism.

MID-TERM FEDERALISM REFORM STRATEGIES

Members of Congress should consider the following two important reform objectives as part of their ongoing efforts to revive and protect the Founders' original federalist system of governance:

Strategy #3: Congress should limit its ability to preempt state or local laws under the Commerce Clause, unless clear constitutional justification exists to do so.

Among the few enumerated powers entrusted to federal lawmakers in the U.S. Constitution is the power to "regulate commerce...among the several states" (Article I, Section 8, Clause 3). The Commerce Clause, as it is more commonly known, has undergone the most tortuous literal metamorphosis in American political and legal history. What "regulation of interstate commerce" meant was commonly understood by the Founders, lawmakers, and jurists of the early Republic; yet modern federal jurists and legislators, as well as many so-called progressive academics and legal theorists, have contorted the interpretation of this phrase to give it a meaning the Founders never intended. They use it to justify an ever-expanding array of federal programs and regulatory interventions.

If Congress hopes to breathe new life into the Founders' original federalist model, it is important that policymakers reaffirm and clarify the original interpretation of the Commerce Clause so that it cannot be used to advance unconstitutional objectives.

"Interstate commerce" is the economic activity between or involving two or more states. The term "commerce" in interstate commerce does not signify manufacturing, production, or anything else. "[T]he Founders conceived of 'commerce' as 'trade,' the interchange of goods by one State with another," notes legal historian and federalism expert Raoul Berger.[21] And Supreme Court Chief Justice Melville Weston Fuller's summation in the 1895 case *United States* v. *E.C. Knight Co.* notes that "Commerce succeeds to manufacture, and is not a part of it."[22] This is indicative of the prevailing view among jurists for the first 150 years of America's legal history.

Moreover, to qualify for coverage under the Commerce Clause, an activity not only must represent *bona fide* commerce, but it must be truly interstate in scope. Obviously, this means that

21. Raoul Berger, "Judicial Manipulation of the Commerce Clause," *Texas Law Review*, Vol. 74, Issue 4 (March 1996), p. 703.
22. Justice Melville Weston Fuller, *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 12 (1895).

federal lawmakers cannot reach any trade or commerce that is purely *intra*state—that is, taking place solely within the confines of one state—under the Commerce Clause.

Finally, it is important to note that even when a certain activity qualifies as "interstate commerce," it does not mean that the Founders intended the federal government to regulate that trade or commerce in the modern sense. As Roger Pilon, a constitutional law scholar with the Washington, D.C.–based Cato Institute, argues, the purpose of the Commerce Clause was "not so much to convey a power 'to regulate'...as a power 'to make regular' the commerce that might take place among the states."[23]

The Founders gave the national government limited preemptive authority under the Commerce Clause to end economic protectionism and discrimination among the states and to ensure that a free capitalistic marketplace could develop nationwide. In fact, in an 1829 correspondence with J. C. Cabell, James Madison made it absolutely clear what the purpose of the Commerce Clause was:

> [It] grew out of the abuses of the power by the importing States in taxing the non-importing, and was intended as a negative and preventative provision against injustice among the States themselves, rather than as a power to be used for positive purposes of the General Government.[24]

And as former Judge Robert Bork explained more recently, "[E]veryone agrees that the historic, central function of the commerce clause was to empower Congress to eliminate state-created obstacles to interstate trade."[25]

The Commerce Clause was intended to protect the free flow of commerce among the states, not to be a prescriptive tool of social engineering to re-craft the states in the image of the national government's liking. The modern reach of the Commerce Clause since the New Deal has come to encompass almost every human activity. Today, activities that traditionally were considered parochial in nature and therefore best administered or monitored by state and local officials are subject to federal regulation or oversight through a tortured reading of the Commerce Clause. Federal programs and regulations in the fields of crime control, education, infrastructure development, and environmental protection, to name a few, are justified under this Commerce Clause rationale, despite their often *intra*state, and inherent non-commercial, nature.

It is important that Congress initiate a debate over the purpose and scope of the Commerce Clause. Furthermore, Congress should reevaluate existing federal programs and policies and consider devolving programs spawned through contorted interpretations, or abolishing them altogether.

In several important recent Supreme Court decisions, such as *United States* v. *Lopez*[26] and *Printz* v. *United States*,[27] the Court showed a newfound willingness to strike down as unconstitutional federal laws that were conceived under a spurious Commerce Clause rationale. In *Lopez* and *Printz*, it struck down two federal gun statutes—the Gun-Free School Zones Act of 1990 and the Brady Handgun Violence Prevention Act of 1993—largely because federal policymakers injudiciously had invoked the Commerce Clause

23. Roger Pilon, "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," in David Boaz and Edward H. Crane, eds., *Market Liberalism: A Paradigm for the 21st Century* (Washington, D.C.: Cato Institute, 1993), p. 42.

24. Letter from James Madison to J. C. Cabell, February 12, 1829, quoted in Berger, "Judicial Manipulation of the Commerce Clause," p. 705.

25. Robert H. Bork, "Federalism and Federal Regulation: The Case of Product Labeling," *Critical Legal Issues*, Washington Legal Foundation *Working Paper Series* No. 46, July 1991, p. 10.

26. U.S. 93–1260.

27. U.S. 95–1478.

as justification for preempting state and local prerogatives in this field. The Court made it clear in these decisions that such activities were neither "interstate" in nature nor "commerce" in the true sense of the term, and therefore could not be reached by Congress under the Commerce Clause.

Regrettably, however, a remarkable range of federal programs and policies remain on the books, and many new laws are introduced each session, that invoke the Commerce Clause as their *raison d'être*. To end this practice, Congress must demand that adequate consideration and justification for legislation that has potential federalism implications be undertaken before the legislation can be passed into law.

Congress also may need to take steps to ensure that the Commerce Clause in particular cannot be cited as justification for federal programs or policies unless they meet specific tests outlined in detail in a recent Heritage publication, *The Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Information Age*.[28]

To summarize, legislation is needed that clearly defines what each of the terms in the phrase "regulation of interstate commerce" means, such that the understanding is consistent with the Founding Fathers' original intent. Specifically, such legislation would need to delineate which issues fall under the Commerce Clause and which do not. Finally, the legislation would need to address the ways in which existing programs or court precedents that do not support the original understanding of the Commerce Clause would be handled. Congress would be wise to eliminate as many programs and precedents as possible that rest on questionable Commerce Clause foundations.

Congress must not "throw the baby out with the bath water," however, by striking down Commerce Clause cases handed down by the Court this century that protect or encourage the free flow of interstate commerce. The Supreme Court has developed a substantial body of law over the past century known as Dormant Commerce Clause (DCC) jurisprudence, which deals with the constitutionality of state efforts to regulate interstate commerce whenever Congress has been silent on the issue. Relying on the Commerce Clause as justification, the courts typically struck down as unconstitutional state laws and regulations that regulated interstate commerce, even though the Constitution empowers only Congress to protect the free flow of interstate commerce.[29] Some legal scholars have questioned the Court's authority to take any steps to guard the lanes of interstate commerce when Congress has not acted, and have recommended that all Dormant Commerce Clause jurisprudence be struck down as unjustifiable judicial activism.

These critics make an important point, but they should recognize the beneficial nature of the Court's decisions in this field. "In the absence of the DCC, the history of American interstate commerce may well have been substantially different, and worse," argues Michael DeBow, professor of law at Samford University's Cumberland School of Law,[30] because DCC decisions have helped to create a more free, open national marketplace for companies and consumers by preventing economic balkanization, trade wars, and product discrimination among the

28. See "New Federalism Tensions and a Framework for the Future," in Thierer, *The Delicate Balance*, pp. 81–118.

29. For example, see *Baldwin v. G.A.F Seelig*, 294 U.S. 511 (1935); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Pike v. Bruce Church*, 397 U.S. 137 (1970); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977); *Raymond Motor Transportation v. Rice*, 434 U.S. 429 (1978); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 622 (1981); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988); and *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

30. Michael DeBow, "Codifying the Dormant Commerce Clause," *Public Interest Law Review*, Vol. 69 (1995), p. 77.

states. In fact, many jurists and academics who criticize DCC jurisprudence simultaneously acknowledge the substantial economic benefits associated with these legal decisions. Overturning all DCC decisions, therefore, would jeopardize the stability of certain segments of America's capitalist free marketplace and discourage economic commerce in the process.

To rectify the concerns regarding the constitutionality of the jurisprudence handed down in the field while simultaneously protecting the beneficial commercial nature of these DCC decisions, Members of Congress simply should institute a legislative version of the DCC as part of any statute they consider that deals with Commerce Clause interpretation. By implementing a statutory version of the DCC, Congress would help to legitimize the Supreme Court's jurisprudence in this field and acknowledge the importance of the DCC in guaranteeing commercial harmony throughout the union.

In effect, Congress would be saying that the country's internal lanes of trade should be free and unfettered of protectionist or discriminatory regulations. Professor DeBow, who has developed such a legislative solution to accomplish this objective, concludes that:

> Congress should legislate a version of the DCC in order to guard against interstate trade wars, while simultaneously eliminating the uncertainty caused by some aspects of current DCC doctrine.... A codification of the DCC should require simply that state laws not discriminate against out-of-state businesses. Congress clearly has the authority to enact such language under the current understanding of its commerce power, and it seems likely that Congress would have the authority to do so even under the original understanding of the Commerce Clause or, perhaps, the Privileges and Immunities Clause.[31]

In other words, a legislative version of the DCC would act, in effect, as a domestic free trade statute that clarifies and strengthens the intentions behind the Commerce Clause.

Strategy #4: Congress should enact anti-delegation legislation that ends the unconstitutional transfer of lawmaking authority from the legislative to the executive branch.

Congress should curtail and strictly limit the powers of cabinet departments and independent regulatory agencies to preempt state and local governments. Executive branch cabinet agencies and independent regulatory agencies have amassed a disturbing amount of power. So long as federal agencies and officials enjoy the broad discretionary powers that are reserved under the Constitution to the elected lawmakers of the legislative branch, they will continue to ignore or flout federalism statutes and protections.

This should not be surprising; regulators exist to regulate. They cannot be expected either to surrender power voluntarily or to stop imposing expensive, preemptive rules because it would not be in their best interest to do so. Nor should anyone mistake who is to blame for such activity: If Congress had not delegated broad discretionary powers to these agencies in the first place, and if it would start to take back the authority that it delegated unconstitutionally in the past, then the power of federal regulatory agencies and administrative offices would be strictly curtailed and diminished.

Unfortunately, from the time of the New Deal, Congress has justified such delegation as allowing for more scientific lawmaking by administrative experts. Granting regulators rulemaking authority was seen as a way to conserve valuable time for Congress to debate the heart of the issues, leaving executive branch agencies to fill in the fine print. Although the Supreme Court struck down earlier efforts by Congress to delegate authority to these agencies,[32] the judicial branch eventually joined a

31. *Ibid.*, pp. 78–79.

silent conspiracy to undermine the Constitution and accepted the agencies' rationales for delegation.[33]

Constitutional scholars have found these justifications for delegation wholly deficient.[34] The foremost criticism is that delegation conflicts with the Constitution. The language of Article I, Section 1, is clear: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Nowhere does the Constitution allow for the exercise of lawmaking powers or functions by non-elected executive branch administrators and bureaucrats

Delegation also violates the principle of separation of powers among the branches of government. It cannot be regarded as a better method of serving the public because it represents a system of governance that is both unaccountable and undemocratic. As Senator Sam Brownback (R–KS) notes:

> [P]erhaps the most pernicious aspect of delegation is that voters can no longer hold government accountable. Originally designed to be the most accountable branch of government, Congress has grown increasingly irresponsible. The fundamental link between voter and lawmaker has been severed. A handful of broadly written laws has spawned a virtual alphabet soup of government agencies and an overwhelming regulatory burden that undermines the very idea of representative government.[35]

This led Cato Institute scholars David Schoenbrod and Jerry Taylor to refer to the practice of delegation as the "corrosive agent of democracy" and to argue that "delegation does not help secure 'good government'; it helps destroy it."[36]

Congressional action to end the unconstitutional practice of delegating authority to administrative agencies would have important implications for federalism. Such a bold move would minimize the preemptive powers of the federal government and hold elected Members of Congress accountable for their actions. With Congress no longer able to blame regulatory agencies and administrators for government overreach, Washington's ability to interfere in state and local matters would be greatly diminished.

Legislation was considered in the 105th Congress that would have advanced this anti-delegation agenda. The Congressional Responsibility Act of 1997, introduced in the Senate (S. 433) by Senator Brownback and in the House (H.R. 1036) by Representative J. D. Hayworth (R–AZ), garnered wide bipartisan support but was not passed by either house. If implemented, anti-delegation efforts like the CRA

32. See, in particular, *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

33. The Supreme Court decision in *J. W. Hampton, Jr., & Co.* v. *U.S.*, 276 U.S. 394 (1928), is widely cited as a watershed moment in the history of anti-delegation, because from that case forward the Court legitimized and accepted congressional efforts to delegate power to administrative bodies. Prior to *J. W. Hampton*, the Court had held firmly to a doctrine of non-delegation of congressional authority to administrative agencies.

34. Theodore Lowi has done pioneering work in this field. See Theodore J. Lowi, "Liberal Jurisprudence: Policy Without Law," *The End of Liberalism: The Second Republic of the United States* (New York, NY: W. W. Norton & Company, 1969, 1979), pp. 92–126. More recently, a study by New York Law School professor David Schoenbrod has been instrumental in calling attention to the deficiencies of delegation. See David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven, CT: Yale University Press, 1993).

35. Senator Sam Brownback, prepared statement on the Congressional Responsibility Act of 1997, presented before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, September 25, 1997; available on the Internet at *http://www.house.gov/judiciary/5128.htm*.

36. David Schoenbrod and Jerry Taylor, "The Delegation of Legislative Powers," *Cato Handbook for Congress, 105th Congress* (Washington, DC: Cato Institute, 1997), p. 47.

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would represent a significant step back toward accountable, limited government, ending what Representative Hayworth—referring specifically to the practice of delegation—calls "regulation without representation."[37]

LONG-TERM FEDERALISM REFORM STRATEGIES

Certain federalism reforms will require more time, consideration, and debate than those listed above; they should be considered as long-term agenda items. The three reforms that follow should be discussed in Congress, even though it is unrealistic to expect action on these items in the current session.

Strategy #5: Congress should give the states the ability to propose amendments to the Constitution on their own, without having to call for a constitutional convention.

This reform would rectify the imbalance between the states and the federal government regarding how amendments to the Constitution are proposed.

Article V of the Constitution allows Members of Congress to propose amendments to the Constitution in much the same way they introduce bills. But under Article V, the states can introduce amendments to the Constitution only by convening a formal constitutional convention. Perhaps the Founders thought this would be easy enough for the states to do; but over time, the states have come to view the convening of a constitutional convention as a radical step that might open the door to more harm than good. Therefore, states appear reluctant and unable to muster the support needed to call such a convention. Thus, the states rely largely on Congress to introduce constitutional amendments.

This constitutional imbalance could be easily remedied if the states simply were given the ability to propose amendments to the Constitution without having to call a formal convention. The states could, by a two-thirds majority vote, propose amendments to the Constitution. Congress then would be able to accept or reject these amendments by a similar two-thirds vote.

To change the Constitution in this manner and place the states on equal footing with the federal government, Congress would have to propose, of course, a new amendment to the Constitution. The states should work with Members of Congress to devise such a mechanism and ensure that the states have this federalism protection in the future.

Strategy #6: Congress should allow the states to hold their representatives more accountable by giving them the right to convene their congressional delegations when they feel egregious federal mandates and policies are being imposed.

This type of reform would rectify the accountability problem created by the adoption of the Seventeenth Amendment in 1913, which stripped the states of their power to elect Senators directly to Congress.

After the adoption of the Seventeenth Amendment, Americans received the right to elect the Senators of their state through popular vote. Although this move can be considered an important victory for direct democracy, it also can be seen as a setback of sorts for the citizens of individual states. Prior to the adoption of the Seventeenth Amendment, Senators had been appointed by state legislatures, as mandated in Article I, Section 3, of the Constitution.

In certain ways, this system actually held Senators *more* accountable to the people of the individual states because Senators were appointed by members of the state legislatures, which gave elected members of these legislatures a more controlling hand or voice in the making of national policy. Essentially, the Founders opted for

37. Representative J. D. Hayworth, prepared statement on the Congressional Responsibility Act of 1997, presented before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, September 25, 1997; available on the Internet at *http://www.house.gov/hayworth/testimony/1036.htm*.

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this system to ensure that at least one branch of the federal government would be held directly accountable to the state legislatures, thereby giving the states an important check on federal power. "As a result [of the adoption of the Seventeenth Amendment]," summarize former Heritage Foundation analysts Douglas Seay and Wesley Smith, "the states [lost] their role in national policymaking and their ability to carry out their constitutional role of checking and balancing the national government."[38]

Coupled with the adoption that year of the Sixteenth Amendment, which removed the restrictions on Congress's ability to tax the income of all Americans, two important impediments to the growth of national power were removed in very short order. Since 1913, the federal government has had an almost unlimited power to tax and spend, while the states have had little say in the ways in which these decisions are made, thanks to the adoption of the Seventeenth Amendment.

Although some political scientists still question the wisdom of the Seventeenth Amendment, most Americans have become accustomed to electing their political representatives directly, and they are unlikely to want to surrender this right. Optimally, however, a system or mechanism could be created that preserves the right of the citizens to elect their federal officials directly but allows them to demand more accountability of these federal officers to the interests of their states and the state legislatures at the same time.

One such mechanism might take the form of an annual or semi-annual meeting of state and federal representatives within the state capitals to discuss federal policies and programs that might affect the states. A legislature could request that the state's entire congressional delegation convene for such a meeting, or it could request that just a few members represent their state delegation of U.S. Senators and Representatives. State legislators then would be able to confront the federal representatives of their state and ask them to justify programs or regulations that have a potential impact on their state. Consequently, state officials could communicate their concerns about various federal initiatives before they have been acted on or implemented.

Alternately, or in addition to this plan, state legislatures simply could demand the right to convene their federal representatives on an ad hoc basis whenever they felt particularly egregious federal mandates or policies were being imposed on them that demand immediate attention. Either way, such mechanisms should be implemented to give the states the ability to act as a substantive check on national power, to regain a voice in federal matters, and to hold federal representatives accountable to the interests of their state.

Strategy #7: Congress should give the states a supermajority veto power over federal legislation or regulation that preempts their authority, or that requires them to administer federal programs or rules.

If the reforms mentioned above were implemented but federal officials still found it easy to put in place rules and regulations that run contrary to the true spirit and intent of the Constitution and violate the sovereignty of the states and the people, then a more radical reform option could come into consideration that would ensure the Founders' original balance of powers was restored and protected.

Many state and local groups and representatives advocate the adoption of a "states' rights veto" power that would force Congress to reconsider particularly egregious or potentially unconstitutional acts. This states' rights veto power would require that a supermajority (that is, two-thirds) of the states pass resolutions calling for the repeal of a specific federal statute or regulation that they collectively feel has been imposed unjustly on them. The states would have three to five years to consider passage of the veto.[39]

38. Douglas Seay and Wesley Smith, "Federalism," in Stuart M. Butler and Kim R. Holmes, eds., *Issues '96: The Candidate's Briefing Book* (Washington, DC: The Heritage Foundation, 1996), p. 432.

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More important, however, is that, even if such a mechanism were adopted, it must have certain limits to ensure that some important powers and responsibilities guaranteed to the federal government by the Constitution are not sacrificed. For example, the states should not receive the right to use such a veto power to interfere with the federal government's foreign policy or national security decisions. The Framers of the Constitution unambiguously entrust such responsibilities to the federal government because of the importance of having a unified voice and policy in the field of global affairs and diplomacy.

This is also the case with regard to treaty-making with foreign countries in general. The Constitution prohibits the states from making treaties with foreign countries, for fear of a balkanization within the American Republic. Not only does this mean the federal government has the exclusive right to negotiate with foreign governments on behalf of all Americans in foreign policy matters, but it means also that the federal government is the only entity that has the constitutional authority to enter into trade agreements and commercial treaties with foreign countries. Therefore, if a states' rights veto mechanism were put into place, it would be vital that these sorts of exceptions—which have solid constitutional and practical justifications—be included in the measure so that the states could not overrule federal officials on sensitive matters.

OTHER REFORMS TO HELP TO RESTORE LIMITED, CONSTITUTIONAL GOVERNMENT

The strategies above are only a few of the reforms that could be pursued in upcoming sessions of Congress to restore the proper balance of powers between the states and the federal government. Other important reforms could be implemented to ensure that constitutional government is protected and that America's original federalist system is reinvigorated and honored.[40] For example, Congress should:

- **Devise a package of devolution options** to begin returning programs and powers to the states that never belonged to the federal government in the first place, such as educational, infrastructural, and most environmental controls programs.
- **Impose term limits on federal officeholders** to encourage greater turnover, which, in turn, would present opportunities for fresh state and local officials to represent their interests in Congress.
- **Enact a simpler, fairer tax system,** such as a flat tax, to impose firm limits on the federal government's ability to usurp the resources of the states and the people.
- **Pass a balanced budget amendment** to rein in federal spending and restrict the ability of the federal government to create expensive new programs and entitlements that encroach on traditional state and local responsibilities.
- **Enact regulatory reform** that requires regulatory decisions to be based on such common-sense principles as sound science and cost-benefit analyses. Regulators should be held accountable, for example, through strong judicial review mechanisms and annual reports to the public, as part of the federal budget process, on the rules they issue; how much they will spend to issue those rules; and their expected benefits and costs.

CONCLUSION

As America approaches the 21st century and gets closer to celebrating its 225th year of

39. For more information, see Cooper and Thompson, "The Tenth Amendment: The Promise of Liberty," pp. 5–6.

40. For many other creative ways to rein in federal power, return functions to the states, and avoid any political pitfalls in the process, see Douglas Seay and Robert E. Moffit, "Transferring Functions to the States," in Stuart M. Butler and Kim R. Holmes, eds., *Mandate for Leadership IV: Turning Ideas Into Actions* (Washington, DC: The Heritage Foundation, 1997), pp. 87–127. See also Seay and Smith, "Federalism," *op. cit.*

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existence, the time seems ripe for a fundamental reassessment of the current status of federalism in the American Republic. Clearly, this past century has not been kind to the Founders' original model of constitutional federalism, as federal policymakers and jurists have contorted various words and phrases of the Constitution in an effort to justify the expansion of federal power relative to the states and the people.

This is very unfortunate because federalism remains the most appropriate system of political organization for such a vibrant and diverse country as the United States. "Federalism reform" should be viewed as a quintessential "good government" issue. The reforms discussed in this paper should be undertaken as part of an ongoing effort to restore and reinvigorate sound constitutional government. More important, any reform efforts should proceed in a cooperative, non-partisan manner because federalism is neither a Democrat nor a Republican issue; rather, it is an American issue that should be placed at the top of the agenda of the leadership of both parties because it is concerned with matters that lie at the very nature of the republic.

If policymakers profess to believe in the value of creative state and local experimentation, vigorous interstate commerce, competition, and the promises of liberty that come with checks and balances on government, then they should take the necessary steps to reinvigorate and protect what many historians, constitutional scholars, and Americans believe is the Founding Fathers' most important contribution to modern civilization.

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APPENDIX: EXECUTIVE ORDER NO. 12612 ON "FEDERALISM"

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of government responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

Section 1: *Definitions.* For purposes of this Order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and where relevant, to State governments, including units of local government and other political subdivisions established by the States.

Section 2: ***Fundamental Federalism Principles.*** In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism principles:

(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

(b) The people and the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) In most areas of government concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people, and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our Constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(g) Acts of the national government—whether legislative, executive, or judicial in nature —that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local government, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

Section 3: *Federalism Policymaking Criteria.* In addition to the fundamental federalism principles set forth in section 2, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For purposes of this Order:

(1) It is important to recognize the distinction between problems of a national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary or desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

Section 4: *Special Requirements for Preemption.*

(a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

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(b) Where a federal statute does not preempt State law (as addressed in subsection [a] of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and federally protected interests within its area of regulatory responsibility, the department or agency shall consult to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

Section 5: ***Special Requirement for Legislative Proposals.*** Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or,

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Section 6: *Agency Implementation.*

(a) The head of each Executive department and agency shall designate an official to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection [c] of this section, shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A–19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

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(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State government functions, or other aspects of State sovereignty.

Section 7: *Government-wide Federalism Coordination and Review.*

(a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A–19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A–19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concerns. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and messages transmitting legislative proposals to Congress.

Section 8: *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Ronald Reagan
The White House
October 26, 1987

Testimony of Edwin Meese III

Before the Committee on Governmental Affairs

United States Senate

Thursday, 6 May 1999

Mr. Chairman and members of the Committee: Thank you for your invitation to appear at this hearing on the topic of "Federalism and Crime Control." As a former Attorney General of the United States and as the Chairman of the American Bar Association Task Force on the Federalization of Crime, I appreciate the opportunity to share these thoughts with you. At the same time, let me make it clear that these views are my own and do not necessarily represent those of the organizations with which I am affiliated or the policy of the American Bar Association.

The Criminal Justice Section of the American Bar Association created a task force in response to widespread concern about the number of new federal crimes that have been created over the past several years by Congress. Its initial objectives were to look systematically at whether there has been, in fact, an increase in federal crimes which duplicate state crimes, and if so, to determine whether that development adversely affects the proper allocation of responsibility between the national and state governments for crime prevention and law enforcement.

The members of the Task Force were selected with the explicit goal of including persons with diverse political and philosophical backgrounds. It was hoped that the Task Force's conclusions and recommendations would be the product of a consensus among respected persons whose views on criminal justice issues generally would vary widely.

As previously mentioned, I served as Chairman of the Task Force. Its members included a former United States Senator, Howell Heflin, a former Congressman, Robert Kastenmeier, a former Deputy Attorney General of the United States, a former Chief Executive of the Law Enforcement Assistance Administration of the Department of Justice, former State Attorneys General, present and former Federal and State prosecutors, State and Federal appellate judges, a police chief, private practitioners who specialize in criminal defense, and scholars from the legal academic community.

I might mention that the Task Force benefited greatly from the skillful assistance of Professor James Strazzella, of Temple University Law School, who served as reporter for the Task Force and who was the principle author of its report. We also had the invaluable research assistance of Barbara Meierhoefer, Ph.D., who handled the collection and analysis of criminal justice statistical data.

The Task Force undertook to examine the United States Code, data available from public sources, the body of scholarly literature on the subject, the views of professionals in federal and state criminal justice systems, and the experience of the task force members themselves.

The Task Force concluded that the evidence demonstrated a recent dramatic increase in the number and variety of federal crimes. Although it may be impossible to determine exactly how many federal crimes can be prosecuted today, it is clear that of all federal offenses enacted since 1865 over 40% have been created during the past three decades since 1970. The Task Force examined in detail, and this is explained in the report, how the catalogue of federal crimes grew from an initial handful to the several thousand that exist today.

The Task Force also concluded that much of the recent increase in federal criminal legislation significantly overlaps crimes traditionally prosecuted by the states. This area of increasing overlap lies at the core of the Task Force study and report.

The federalization phenomenon is inconsistent with the traditional notion that prevention of crime and law enforcement in this country are basically state functions. The Task Force was impressed with nearly unanimous expressions of concern from thoughtful commentators, including participants within the criminal justice system and scholars, about the impact of federalization. The task force was also impressed that new federal crimes duplicating state crimes became part of our law without requests for their enactment from state and federal law enforcement officials.

As the size of the national government has grown, it is reasonable to expect that there would be some expansion of federal crimes if, for no other reason, than to protect federal programs. That is quite a different matter, however, from the indiscriminate federalization of local crime for no reason other than that certain spectacular incidents have brought it to public attention, or that the enactment of new federal laws appear to be politically popular.

The Task Force looked systematically at whether new federal criminal laws, which were popular when enacted, are actually being enforced. It determined, based on available data, that in many instances they are not. While there are more people in federal prisons than ever before and they are serving longer sentences, that condition is not the result of increased federal prosecution of crimes formerly prosecuted by states. It is principally a function of increased resources devoted to federal law enforcement, particularly for drug offenses, and the impact of the sentencing guidelines.

The American Bar Association Task Force Report supports the position of Chief Justice William Rehnquist, who deplored the expanded federalization of crime in his annual report on the federal judiciary, issued last December. The Chief Justice cited the tendency of Congress "to appear responsive to every highly publicized societal ill or sensational crime."

Furthermore, as the Task Force found, "increased federalization is rarely, if ever, likely to have any appreciable affect on the categories of violent crime that most concern Americans, because in practice federal law enforcement can only reach a small percent of such activity."

Court statistics show that federal prosecutions comprise less than 5% of all the prosecutions in the Nation. The other 95% are state and local prosecutions.

The Task Force concluded that numerous damaging consequences flow from the inappropriate federalization of crime. Among them are the following:

- An unwise allocation of scarce resources needed to meet the genuine issues of crime;
- An unhealthy concentration of policing power at the national level;
- An adverse impact on the federal judicial system;
- Inappropriately disparate results for similarly situated defendants, depending on whether essentially similar conduct is selected for federal or state prosecution;
- A diversion of Congressional attention from criminal activity that only federal investigation and prosecution can address; and
- The potential for duplicative prosecutions at the state and federal levels for the same course of conduct, in violation of the spirit of the Constitution's double—jeopardy protection.

Perhaps the most compelling reason to oppose nationalizing crime is that it contradicts constitutional principles. The drafters of the Constitution clearly intended the states to bear responsibility for public safety. The Constitution gave Congress jurisdiction over only three crimes: treason, counterfeiting, and piracy on the high seas and offenses against the law of nations.

As he wrote in The Federalist No. 45, James Madison envisioned little or no role for the federal government in law enforcement:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and property of the people, and the internal order, improvement, and prosperity of the state."

Even Alexander Hamilton, the greatest proponent in his day of a strong national government, saw law enforcement as a state and local concern. If Hamilton were alive today, he would be appalled at the use of the police power by federal agencies. To reassure the states that the federal government would not usurp state sovereignty, Hamilton wrote in The Federalist No. 17 that law enforcement would be the responsibility of the states:

> "There is one transcendent advantage belonging to the province of the state governments, which alone suffices to place the matter in a clear and satisfactory light. I mean the ordinary administration of criminal and civil justice."

Unfortunately, the damage caused by the federalization of crime is not merely abstract or academic. The more crime that is federalized, the greater the potential for an oppressive and burdensome federal police state. As early as the 1930s, FBI Director J. Edgar Hoover warned of the dangers of a "national police force." In fact, Hoover was so fearful of an expansive federal role in law enforcement that he resisted efforts by his allies in Congress to make the FBI independent of the Justice Department and to expand the bureau's jurisdiction over additional crimes. As an alternative to a federal police force, Hoover instead created the National Academy as an adjunct to the FBI's own training facilities, where local law-enforcement officers could be trained and then return to lead their own forces. This greatly enhanced the quality of law enforcement nationwide without creating the federal police force that Hoover so feared.

As the National Sheriff's Association recently stated, with every additional federal crime, "we're getting closer to a federal police state. That's what we fought against 200 years ago – this massive federal government involved in the lives of people on the local level." The National District Attorneys Association has expressed a similar view, saying the trend "not only places an intolerable burden on the federal criminal justice system, but is changing the very nature of that system by intruding on cases that by every standard should be handled by local prosecutors."

For years following the adoption of the United States Constitution in 1789, the states defined and prosecuted nearly all criminal conduct. The federal government confined its prosecutions to less than a score of offenses. As Sara Sun Beale, Professor of Law at Duke University School of Law and an expert on this subject, recently stated, originally federal criminal offenses generally "dealt with injury to or interference with the federal government itself or its programs. The federal offenses of the time included treason, bribery of federal officials, perjury in federal court, theft of government property, and revenue fraud. Except in those areas where federal jurisdiction was exclusive (the District of Columbia and the federal territories) federal law did not reach crimes against individuals. Crimes against individuals – such as murder, rape, arson, robbery, and fraud – were the exclusive concern of the states. State law defined these offenses, which were prosecuted by state or local officials in the state courts."

Crime was seen as a uniquely local concern and the power to prosecute rested almost exclusively in the states, whose law enforcement activities covered nearly all the activity believed worthy of criminal sanction. Crime did not become a national issue in presidential campaigns until 1928, but today it is the resonating staple of federal as well as state electoral politics. The ABA Task Force Report provides extensive statistical data concerning the current high level of federal legislative activity involving crimes that have traditionally been handled at the state level. This is collected in the report, which I will provide to the committee and suggest that it be made a part of the record of this hearing.

I believe it is important to present to the Committee the Task Force's findings concerning the reasons for continuing legislative federalization of crime. As the extensive bibliography in

the report shows, writer after writer has noticed the absence of any underlying principle governing Congressional choice to criminalize conduct under federal law that is already criminalized by state law.

The study found that new crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need. Observers have recognized that a crime being considered for federalization is often "regarded as appropriately federal because it is serious and not because of any structural incapacity to deal with the problem on the part of state and local government." This particular finding was expressed by Professors Franklin E. Zimring and Gordon Hawkins in their article, *Toward a Principled Basis for Federal Criminal Legislation*, published in volume 543 of the Annals of the American Academy of Political and Social Sciences, in 1996.

There is wide-spread recognition that a major reason for the federalization trend – even when federal prosecution of these crimes may not be necessary or effective – is that federal crime legislation is politically popular. For example, police executives noted in communications to the task force that despite recognized problems with federalization, "the trend has not declined, in part because federalization is politically popular. Because relatively little hard research on effective crime control has been conducted or disseminated to lay people, they are easily convinced that making an offense a federal crime means we are taking a tougher stance against such actions. Most citizens believe that by federalizing crime, we will somehow rid our communities of violence. Herein lies the greatest danger in federalization: creating the illusion of greater crime control while undermining an already over-burdened criminal justice system." This was the position on federalism taken by the Police Executive Research Forum, an organization of most major city Chiefs of Police, which was transmitted to the Task Force.

The Task Force recognized, and I present to you today, the conclusion that excessive federalization of criminal law is a difficult problem that is not likely to be countered effectively by a neatly packaged blue print for action. Because of the political ramifications as well as the pattern of legislative activity that has grown up over the past several years, it is unlikely that this pattern of activity will be easily changed. On the contrary, what the Task Force believes is required has more to do about how the Congress and the public *think* about these issues – more to do with a careful approach, rather than any specific proposal for mechanical action or line drawing. If the legitimate concern to deal effectively with criminals is met only by a generalized response of passing more federal criminal laws and funding more federal law enforcement resources, then the serious risks we have identified will only increase. That is why the Task Force's most fundamental plea is for all who are concerned with effective law enforcement – legislators and members of the public alike – to think carefully about the risks of excessive federalization of the criminal law and to have these risks clearly in mind when considering any proposal to enact new federal criminal laws or to add more resources in personnel to federal law enforcement agencies.

Because inappropriate federalization produces insubstantial gains at the expense of important values, it is important to legislate, investigate and prosecute federal criminal law only in circumstances where limited legislative time and law enforcement efforts can most realistically deal with the serious problem of crime and do so without intruding on long-standing

values. Congress should not bring into play the federal government's investigative power, prosecutorial discretion, judicial authority, and sentencing sanctions unless there is strong reason for making wrongful conduct a federal crime – unless there is a distinct federal interest of some sort involved.

The opportunity to limit the excessive federalization of local crime provides both a challenge and an opportunity to the Congress. It is conceivable that at some point the Supreme Court might adopt a more narrow construction of the Commerce Clause that would inhibit Congress's authority to federalize local crimes. Indeed this has already been hinted at in some recent opinions. For now the extent to which new legislation will federalize local crimes and the extent to which added federal funds will permit increased federal prosecution of such local crimes as are already covered by federal statutes rests primarily with Congress. It is for this reason that the Task Force suggests that Congress should consider several steps to limit the federalization of local crime:

(1) *Recognizing How Best to Fight Crime Within the Federal System.* The first step is a frank recognition that the understandable pressure to respond to constituent concerns about public safety can be met by taking constructive steps that aid law enforcement without incurring the risks inherent in excessive federalization of criminal law. While recognizing the pressure placed upon members of Congress, there must also be recognition that a refusal to endorse a new federal crime is not a sign that a legislator is "soft on crime." On the contrary, it means that the legislator wants to strengthen law enforcement within the traditional federal structure of this nation by leaving local crime to local authorities. The press, the public, and Congress itself must recognize these important truths.

(2) *Focused Consideration of the True Federal Interests in Crime Control and the Risks of Federalization of Local Crime.* Congress can avoid inappropriate federalization by recognizing its limited constitutional authority to criminalize conduct and by exercising restraint in passing new criminal laws dealing with essentially local conduct. Congress should insist on focused debate about what criminal conduct should and should not be federalized. This is especially true given the scarcity of funds to meet all needs. In the usually piecemeal debates over what to do about crime, it is critical in allocating federal resources that congressional attention focus on areas that most appropriately fit long-understood federal values and those most likely to produce practical, demonstrable benefits in dealing with crime.

If the increasing federalization were to have a demonstrable practical impact on crime, it would be expected that there would be a significant number of prosecutions, prosecutions that might act as a deterrent or have an incapacitating effect on criminals. This does not seem to be the case. The new waves of federal statutes often stand only as symbolic book prohibitions with few actual prosecutions. This means that whatever the reasons for any recent crime reduction, the reduction can not realistically be attributed to the creation of more localized federal crimes. There is no persuasive evidence that federalization of local crime makes the streets safer for American citizens.

Where a clear federal interest is demonstrated, especially to meet a public safety need not being adequately dealt with by the states, the federal interest should be vindicated — if needed,

by new laws and new resources. Otherwise, the federal response should be limited to aiding state and local law enforcement, not duplicating their efforts.

(3) *Institutional Mechanisms to Foster Restraint on Further Federalization.* Congress should consider mechanisms to assist its analysis of proposed crime legislation and proposed federal law enforcement funding to provide the systematic, coherent analysis that is needed. One possible mechanism, for example, might require that the costs to the federal/state system of any new federal crime law be the subject of concrete, Congressionally supervised analysis before passage— perhaps by an impact statement of the sort provided by Congressional Budget Office assessment or by Congressional Research Service analysis. Such an analysis would provide Congress with objective data upon which to base legislative decisions. It could discern federal/state comparative costs, as well as the real need and the extent of benefits, and the risk of adverse impacts of the legislation. The use of such analysis in the highly charged debate about crime could be particularly useful in light of the reasons that account for most of the legislation at issue in this Report.

Beyond an impartial, technical staff analysis, Congress might consider institutionalizing an impartial public policy analysis by its own members, perhaps through the mechanism of a joint Congressional committee on federalism. Such a committee could assess proposed crime legislation and other proposals with significant impact on federal/state jurisdictional relationships. In any event, the federalization aspect of proposed crimes calls for close, on-going scrutiny in those standing Congressional committees with criminal law jurisdiction, as well as those with oversight responsibilities.

A federalization assessment, by Congressional staff and by a select joint committee, could usefully be made both as to proposed new federal crime bills and proposed new funding for federal law enforcement personnel.

(4) *Sunset Provisions.* When, after careful analysis, new federal criminal laws are thought warranted, the new legislation should include a fairly short "sunset provision," perhaps no more than five years. Congress has found the sunset safeguard acceptable in other contexts and it would seem particularly valuable in this arena. Use of this safeguard will afford future Congresses an opportunity to assess claims made prior to enactment about what a particular statute might accomplish in dealing with crime. The use of a sunset provision might also be of value where the claimed need for federal legislation has to do with a perceived state deficiency in dealing with certain crimes; in due time, that deficit may be cured at the state level.

(5) *Responding to Public Safety Concerns with Federal Support for State and Local Crime Control Efforts.* Congress can significantly respond to public safety concerns without enacting new federal statutes or adding new funds for federal law enforcement. Virtually all of the criminal behavior that most concerns citizens is already a state crime. Congressional allocations of funds to state systems in support of state criminal justice efforts have, in modern times, been one of the alternative techniques used by the federal government in assisting with crime problems without duplicating efforts. That approach to combating crime is believed by many to be an appropriate technique which avoids many of the undermining effects of legislating

a federal crime in areas properly left to the states. Federal funding for crime control can take the form of block grants, of specifically targeted program funds, or a combination of the two.

The expanding coverage of federal criminal law, much of which has been enacted without any demonstrated or distinctive federal justification is moving the Nation rapidly toward two broadly overlapping, parallel, and essentially redundant sets of criminal prohibitions each filled with differing consequences for the same conduct. Such a system has little to commend it and much to condemn it.

As the Task Force Report concluded:

The principles of federalism and practical realities provide no justification for the duplication inherent in two criminal justice systems if they perform basically the same function in the same kinds of cases. There are no persuasive reasons why both federal and state police agencies should be authorized to investigate the same kind of offenses, federal and state prosecutors should be directed to prosecute the same kinds of offenses, and federal and state judges should be empowered to try essentially the same kind of criminal conduct. When the consequences of these parallel legal systems can be so different, increases in the scope of federal criminal law and the areas of concurrent jurisdiction over local crime make it increasingly difficult, if not impossible, to treat equally all persons who engaged in the same conduct and these increases multiply the difficulty of adequately regulating the discretion of federal prosecutors. Moreover, it makes little sense to invest scarce resources indiscriminately in a separate system of slender federal prosecutions rather than investing those resources in already existing state systems which bear the major burden in investigating and prosecuting crime.

In the important debate about how to curb crime, it is crucial that the American justice system not be harmed in the process. The nation has long justifiably relied on a careful distribution of powers to the national government and to state governments. In the end, the ultimate safeguard for maintaining this valued constitutional system must be the principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization.

In the course of these remarks, I have included liberal references to portions of the Task Force Report. Again, let me mention that I alone am responsible for the totality of the views I have expressed today and that the Task Force Report is not official policy of the American Bar Association since such policy can only be expressed after approval by the Association's House of Delegates.

However, let me also state that I believe that these comments and conclusions, as well as the recommendations, would be helpful to the Congress in its consideration of the federal responsibility for crime as well as those areas where the federal government should not be directly involved.

Thank you for the opportunity of presenting these views before the Committee. I would be happy to respond to questions and to provide whatever further information might be of assistance to you in your endeavors.

STATEMENT FOR SENATE GOVERNMENTAL AFFAIRS COMMITTEE

By Judge Gilbert S. Merritt

May 6, 1999

THE TREND TO FEDERALIZE CRIMES THAT TRADITIONALLY HAVE BEEN HANDLED IN STATE COURTS NOT ONLY IS TAXING THE JUDICIARY'S RESOURCES AND AFFECTING ITS BUDGET NEEDS, BUT IT ALSO THREATENS TO CHANGE ENTIRELY THE NATURE OF OUR FEDERAL SYSTEM.

CHIEF JUSTICE REHNQUIST

WHEN I JOINED THE COURT OF APPEALS 22 YEARS AGO WE HAD NINE SITTING JUDGES. TODAY WE HAVE FOURTEEN SITTING JUDGES – FIVE MORE. THEN WE HAD 250 CRIMINAL APPEALS. NOW WE HAVE ABOUT 1,000 A YEAR. WHEN I WAS UNITED STATES ATTORNEY IN MIDDLE TENNESSEE 35 YEARS AGO, I HAD FOUR ASSISTANTS AND THREE SECRETARIES. NOW THERE ARE 20 ASSISTANTS AND A LARGE STAFF. MY CRIMINAL DOCKET 35 YEARS AGO WAS MADE UP OF BANK ROBBERY AND BURGLARY, CAR THEFT (SO-CALLED "DYER ACT" CASES), TAX, THEFT FROM THE MAIL, TREASURY CHECK FORGERIES AND A HOST OF MOONSHINE LIQUOR CASES. NO DRUG CASES. NOW THE

APPELLATE DOCKET OF OUR COURT AND THE CASE LOAD OF THE UNITED STATES ATTORNEY'S OFFICE CONSISTS MAINLY OF DRUG AND ILLEGAL POSSESSION OF FIREARMS CASES AND OTHER CRIMES THAT DUPLICATE STATE CRIMES.

MY EXPERIENCE TELLS ME THAT USING THE FEDERAL COURTS TO HANDLE SUCH CASES, WHICH DUPLICATE EFFORTS OF STATE AND LOCAL LAW ENFORCEMENT, IS BASICALLY A WASTE OF TIME – JUST AS THE PROSECUTION OF LIQUOR CASES 40 YEARS AGO WAS A WASTE OF TIME. FEDERAL PROSECUTION OF DRUG AND FIREARMS CRIME IS HAVING A MINIMAL EFFECT ON THE DISTRIBUTION OF DRUGS AND ILLEGAL FIREARMS.

THE REASON DUPLICATE OR CONCURRENT ENFORCEMENT OF CRIME HAS A MINIMAL EFFECT IS THAT THE COUNTRY IS TOO LARGE AND DIVERSE AND THE NUMBER OF SUCH LOCAL CRIMES TOO GREAT FOR A FEW FEDERAL JUDGES AND PROSECUTORS TO DETER OR AFFECT. OUR LAW ENFORCEMENT EFFORTS WOULD BE MUCH MORE EFFECTIVE IF CONGRESS REPEALED MOST

DUPLICATE FEDERAL CRIMES AND TRIED TO HELP LOCAL AND STATE STREET POLICE, DETECTIVES, PROSECUTORS AND JUDGES DO A MORE EFFECTIVE JOB. THE DIVERSION OF RESOURCES, FOCUS AND ATTENTION AWAY FROM LOCAL EFFORTS AND TOWARD FEDERAL PROSECUTION OF DUPLICATE CRIMES IS ONE OF THE REASONS WE ARE INEFFECTIVE IN DETERRING CRIME. STATE AND LOCAL POLICE, PROSECUTORS AND JUDGES, COMPARED TO THEIR FEDERAL COUNTERPARTS, ARE UNDERPAID AND HAVE TOO MANY CASES PER LAW ENFORCEMENT OFFICIAL TO DEAL WITH.

THE FEDERAL GOVERNMENT SHOULD GET OUT OF THE BUSINESS OF ENACTING AND TRYING TO ENFORCE DUPLICATE FEDERAL CRIMES. IT SHOULD MAKE A POLICY JUDGMENT THAT IT WILL ASSIST LOCAL LAW ENFORCEMENT TO DO A BETTER JOB. IF ALL THE FEDERAL AGENTS AND PROSECUTORS AND FEDERAL DEFENDERS NOW ENFORCING DUPLICATE FEDERAL DRUG AND FIREARMS LAWS WERE ASSIGNED TO STATE AND LOCAL AGENCIES, AND IF FEDERAL MONEY WAS MADE AVAILABLE TO UPGRADE STATE ENFORCEMENT,

THE EFFORT WOULD PAY DIVIDENDS. CONCENTRATE FEDERAL CRIMINAL LAW ENFORCEMENT IN ONLY THE FOLLOWING CORE AREAS:

1. OFFENSES AGAINST THE UNITED STATES ITSELF.

2. MULTI-STATE OR INTERNATIONAL CRIMINAL ACTIVITY THAT IS IMPOSSIBLE FOR A SINGLE STATE OR ITS COURTS TO HANDLE.

3. CRIMES THAT INVOLVE A MATTER OF OVERRIDING FEDERAL INTEREST, SUCH AS VIOLATION OF CIVIL RIGHTS BY STATE ACTORS.

4. WIDESPREAD CORRUPTION AT THE STATE AND LOCAL LEVELS.

5. CRIMES OF SUCH MAGNITUDE OR COMPLEXITY THAT FEDERAL RESOURCES ARE REQUIRED.

IF ELECTED OFFICIALS NEED TO REACT POLITICALLY AND SYMBOLICALLY TO LOCAL CRIME BY PASSING NEW LAWS, THEY CAN ACT SYMBOLICALLY BY PASSING LAWS THAT ASSIST LOCAL LAW ENFORCEMENT OFFICIALS. VIOLENCE IN THE SCHOOLS, OR VIOLENCE AGAINST WOMEN, OR CARJACKING, OR JUVENILE VIOLENCE ARE PROBLEMS THAT MUST BE SOLVED AT THE LOCAL LEVEL. OUR UNDERFUNDED STATE INVESTIGATIVE, ADJUDICATIVE AND CORRECTIONS SYSTEMS MUST BE IMPROVED. PASSING MORE LAWS FEDERALIZING CRIME IS NOT A VALID RESPONSE. AID TO LOCAL ENFORCERS IS A VALID RESPONSE.



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TESTIMONY OF

JOHN M. DORSO

MAJORITY LEADER, NORTH DAKOTA

HOUSE OF REPRESENTATIVES

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS

OF THE UNITED STATES SENATE

REGARDING FEDERALIZATION OF CRIME LAW

May 6, 1999

Mr. Chairman and Members of the Committee:

Good morning. My name is John Dorso. I am the Majority Leader of the North Dakota House of Representatives. I also serve as chairman of the Law and Justice Committee of the National Conference of State Legislatures (NCSL). Today, I am presenting testimony on behalf of NCSL, which represents all of America's state legislators.

I want to thank you for holding these hearings, yesterday and today, on issues of federalism and preemption. There is no more important issue and there is no more difficult issue than the one of sorting out the appropriate roles of the states on one hand and of the national government on the other. This is particularly true when it comes to sorting out the appropriate role of the states and the national government when it comes to the criminal law, the topic of today's hearing and the focus of my testimony.

But first, let me give you a little background on what I believe and what NCSL believes, in general, about constitutional federalism. It will provide a context for understanding why we deplore the current trend in the federalization of the criminal law.

Our touchstone - my touchstone - for analyzing issues of state-federal relations is the Tenth Amendment to the United States Constitution, which, as you know, provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Justice Sandra Day O'Connor, who as you may know served as majority leader of the Arizona Senate, did a good job in her opinion in New York v. United States of explaining with clarity and concision what the Constitution contemplates in terms of state-federal relations:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organization chart. The Constitution instead 'leaves to the States a residuary and inviolable sovereignty' reserved explicitly to the States by the Tenth Amendment.

James Madison made a related point in The Federalist No. 14:

> It is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects...

With respect to the criminal law, the Framers cannot have conceived that the federal criminal jurisdiction would be as broad as it is today. In 1789, federal criminal offenses were very few in number and dealt mostly with injuries to the federal government itself, for example treason, perjury in federal court, bribery of federal officials, and so forth.

Today, by contrast, as documented by an excellent report of the American Bar Association's Task Force on Federalization of Criminal Law, the sweep of the federal criminal law is very broad, so broad in fact that an exact count of the number of federal criminal laws cannot be made with absolute precision. In 1989, a Report to the Attorney General on Federal Criminal Code Reform estimated that there were about 3,000 federal crimes. And over the past 10 years since that report was issued, the federalization of the criminal law has accelerated. The ABA Task Force documents the "explosive growth of federal criminal law." Their research shows that: "More than 40 percent of the federal criminal provisions enacted since the civil war have been enacted since 1970." The ABA report also estimates that "1,000 bills dealing with criminal statutes were introduced in the most recent Congress."

Surely, this is not what the Framers intended. It was understood in 1789 that the general "police power" lies with the states. As the ABA Task Force report reminds us: "Historically, centralization of criminal law enforcement power in the federal government has been perceived as creating potentially dangerous consequences"

Now, I am not going to suggest that the Supreme Court is going to strike down large numbers of federal criminal statutes as violations of the Tenth Amendment. The states are doing

much better in the Court these days. In United States v. Lopez for example, the Court struck down the "Gun Free School Zones" Act and reminded the Congress that there is a limit, somewhere, to its Commerce Clause authority and that the Constitution does not grant Congress "a plenary police power that would authorize enactment of every type of legislation." Nonetheless, few of us anticipate, though some of us might hope, that even the Rehnquist Court will reverse the constitutional revolution effected by the Court in the late New Deal era, allowing the federal government to legislate broadly on domestic social and economic issues. So, the question is primarily a prudential one for Congress itself. Given our constitutional tradition of federalism and given the history in this country of distrust of concentrating power in the center, especially that power related to criminal prosecutions, what limits will Congress place on itself and on the federal agencies promulgating regulations to slow and perhaps even reverse the federalization of criminal law?

The answer to that question for some of you might be that you are not persuaded by such an "old-fashioned," states' rights argument. If the public demands action in response to the outrages of criminals, you might say, Congress must act. If that is your response, I have several practical arguments for why Congress should be much more disciplined when it passes new criminal statutes.

At the very least, Congress should ensure when it creates a new federal crime that it really improves public safety. Let me cite an example.

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On September 8, 1992, in a typically safe Maryland suburb of Washington, D.C., a young mother was dragged to her death in a gruesome "carjacking." It was all over the papers and was the subject of many television news reports. It was shocking. It was awful. Quite understandably, Congress wanted to do something. By October 5 of that year, Congress passed legislation making car-jacking a federal offense punishable by up to life in prison.

But was such congressional action necessary? While Congress was busy creating a new federal crime, Maryland officials charged and prosecuted two young men who had been arrested within hours of the carjacking. One defendant, a minor who was convicted as an adult, was sentenced to life in prison.

With all due respect, it appears that decisions, like this one to create new federal crimes, are driven first by the emotions of members of Congress who understandably want to express their outrage and second by the favorable press and political advantage that can result from "passing a law," even where as in the carjacking example there is no void in state criminal codes and no failure of state law enforcement.

Is the public well served when the perception is created that congressional action is needed and that it will really improve public safety, when often times this is simply not the case? I think not. It only breeds public distrust about the motives of those of use elected to legislative office. It breeds the barroom jokes about the shortest distance between two points being that between a politician and a television camera. I do not suggest that the motives of all or most sponsors of such ineffective federal criminal laws are cynical. But, I am not naïve enough to

believe that all the motives of all the sponsors are free of political calculation. And again with all due respect, I find that disturbing. Perhaps I overstate it, but I have a sense that both the victims of these horrible street crimes and the public in some sense are being used.

Maybe you regard my reaction as too emotional and maybe you think that it shows a lack of understanding about "realpolik." Perhaps you feel that you have been or might be unfairly smeared in a campaign as "soft on crime," that you have been boxed-in by sensational media coverage of violent crime, and that "you have to do what you have to do" to survive the next campaign and continue your good work in other areas. What is harm, you might say, is done by such legislation. Sure, many of these federal street crime statutes are rarely enforced. And yes, 95 percent of criminal prosecutions will continue to be handled by states and localities. So, why not take some symbolic action?

In reply, let me again refer to the recent ABA Task Force Report. It lays out, in a very persuasive fashion, the arguments for why the rapid and slapdash expansion of the federal criminal law results in considerable harm.

First, as I noted earlier, federalization over time of such a broad expanse of the criminal law, especially that related to so-called street crimes, "creates an unhealthy concentration of policing power at the national level." It "disrupts the important constitutional balance between state and federal systems."

Second as Chief Justice Rehnquist has noted federalization of so many crimes can have an adverse impact on the federal judicial system, which often has neither the resources nor in some instances the expertise to handle these cases fairly and efficiently. It makes it more difficult for federal judges to handle their other, very considerable responsibilities.

Third, federalization raises concerns about fairness and the impartial application of justice. Similarly situated defendants may receive grossly disparate sentences depending on whether they are convicted in state or federal court. It allows a great deal of unreviewable prosecutorial discretion. Federal prosecutors may be tempted to engage in so-called cherry picking: choosing to prosecute only high profile cases or cases involving public figures. Less glamorous cases can be left to state and local prosecutors.

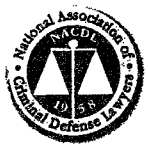
Fourth and most important, federalization can result in what the ABA report calls the "unwise allocation of scarce resources needed to meet the genuine issues of crime". Both Congress and the Justice Department can lose sight of priorities and can fail to focus their resources and attention on the crime problems where they can do the most good.

In short, as the ABA Task Force report concludes: "The principles of federalism and practical realities provide no justification for the duplication inherent in two criminal justice systems if they perform basically the same function in the same kinds of cases."

What is required is some sorting out of responsibility between the federal government and the states. The federal government has important responsibilities within its own sphere. It should concentrate its limited resources and focus on priority targets. In the war against drugs, for example, no state government can negotiate with foreign countries that are the source of narcotics. Similarly, states have neither the resources nor the constitutional authority to interdict the flow of drugs or to engage in quasi-military operations against international cartels. Federal law enforcement agencies traditionally have focused on and have developed considerable expertise in combating complex interstate organized, drug and white-collar crime. They should continue their good work. Similarly, the constitutional role of the federal government as a protector of minorities justifies federal jurisdiction in civil rights cases. And, there may be other specialized categories of criminal offenses where the federal government can make a real difference in improving public safety.

That is the bottom line: improving public safety. Our constituents want us, federal and state elected officials, to get tough with criminals. They will not be fooled by symbolic and ineffective gestures. They want results, not good intentions and surely not political ploys. Let's sort out responsibilities for fighting crime. Let's do it in a way that is practical. And, let's do it in a way that is consistent with our constitutional traditions of decentralized government.

Thank you for this opportunity to testify.



Statement of Gerald B. Lefcourt

Immediate Past President and Chair, Legislative Committee

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. Chairman and Members of the Committee:

The National Association of Criminal Defense Lawyers (NACDL) and I appreciate this opportunity to offer our views on the costs and dangers of over-federalizing criminal law.

I have recently collaborated on an article regarding this subject, with the Immediate Past President of the National District Attorneys Association (NDAA), William Murphy, and the Immediate Past Chair of the American Bar Association's Criminal Justice Section (ABA-CJS), Ronald Goldstock (a former federal prosecutor). In it, we make a recommendation that I hope you will carefully consider: that federalism and cost/benefit analyses accompany all federal criminal justice policy proposals. This article is running simultaneously in the May/Spring magazines of the NACDL, the NDAA, and the ABA-CJS.

The article is careful to note that the opinions expressed in it are those of the authors and do not necessarily reflect the official positions of our respective organizations. In my case, however, the views of the article *do* also reflect the official position of the National Association of Criminal Defense Lawyers. I submit this article to you today as my written testimony on behalf of the NACDL.


"In our every deliberation, we must consider the impact of our decisions on the next seven generations."
From the Great Law of the Iroquois Confederacy

In Our Every Deliberation . . .

Time for Federal Crime Policy Impact Statements

By Ronald Goldstock, Gerald Lefcourt and William Murphy

Did the Iroquois lawmakers have it right? We have previously written about the common ground we have found on core issues of criminal justice policy. *Justice That Makes Sense* appeared simultaneously last year in the magazines of our three respective organizations. In that article, we express our concern about the recent legislative penchant for over-federalizing criminal law. This article is a refinement of our earlier thoughts on the subject — a subject that has profound consequences for the entire criminal justice system, and for society at large.

In the last several years, many observers agree that too often Congress has come to respond to headlines about crime with a "quick-fix" of federal legislation. As United States Supreme Court Chief Justice William H. Rehnquist recently said:

> The number of cases brought to the federal courts is one of the most serious problems facing them today. Criminal case filings in federal courts rose 15 percent in 1998 — nearly tripling the 5.2 percent increase in 1997. Over the last decade, Congress has contributed significantly to the rising caseload by continuing to federalize crimes already covered by state laws.
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> * * *
>
> The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system. The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas, and, ultimately, whether we want most of our legal relationships decided at the national rather than local level.[1]

This February, a 16-member blue ribbon ABA Task Force on the federalization of criminal law, chaired by Reagan Administration Attorney General Edwin Meese III, issued its report, after two years of study ("Meese Report"). The 56-page report is backed by hundreds of pages of impressive statistical findings,

and mirrors the annual report remarks of the Chief Justice: highly publicized criminal incidents are frequently accompanied by proposals for congressional responses for no reason other than the conduct is serious, even if the activity is already handled by state law.[3] The Meese Report concludes that "the Congressional appetite for new crimes regardless of their merit is not only misguided and ineffectual, but has serious adverse consequences, some of which have already occurred and some of which can be confidently predicted."[5]

Sampling of the latest available statistics harnessed by the Meese Report demonstrates:

> [S]everal recently enacted federal statutes, championed by many because they would have an impact on crime, have hardly been used at all.
>
> * * *
>
> This rare use of many federalization statutes calls into question the belief that federalization can have a meaningful impact on street safety and local crime. But the presence of these federalized crimes on the books does present a possible opportunity for both selective prosecutions . . . and for shifting prosecutorial priorities. . . .[4]

Moreover, "[t]hrusting additional crimes into federal court places demands on an already strained federal court system and threatens the quality of essential federal justice."[5] Yet another adverse consequence of the trend toward over-federalization, discussed in the Meese Report, is the counter-productive, "needless disruption of effective state and local enforcement efforts."[6] Indeed, "some attempts to expand federal criminal law into traditional state functions would have little effect in eliminating crime, but could undermine state and local anti-crime efforts."[7]

In short, there is now a general consensus that all too frequently, the quick congressional response to highly publicized societal ills or sensational crimes is a costly federal proposal that simply worsens matters, duplicating or compromising more effective state and local programs. Such proposals may have no appreciable impact upon the problem, while squandering substantial sums of scarce tax dollars.[8] Often, too, they are at odds with our nation's fundamental concern for the civil rights and liberties of its citizens.[9]

With so much congressional activism in this area, we think the Iroquois model is the right one to follow. We propose that Congress dedicate itself to real, specific rules of federalism and cost/benefit principles. This way, crime policy-making would become a disciplined, *statistically justified* exercise, rather than a reckless quest for inefficient sound-bite policies. We suggest a set of impact study guidelines, governing all new federal crime legislation, including all new proposed "federal" crimes as well as all proposed federal criminal law expansions, reforms, enhanced sentences, and federal grant and other funding schemes.

Our proposal is not radical. It is, in fact, one of the Meese Report's recommendations for limiting the inappropriate federalization of local crimes.[10] It is similar to the sentencing guidelines Congress has imposed on federal courts in an effort to ensure fairness and uniformity in federal sentencing. It is similar to the federalism guidelines imposed upon executive agencies by executive order from the Reagan Administration — guidelines which Congress recently reaffirmed. Indeed, prior to any legislation that calls for the completion of a federal form, a paperwork reduction statement is required. Our suggestion also resembles the requirement under the National Environmental Policy Act that an environmental impact assessment be made and considered before the government can take any action which would significantly impact the environment.

We do not advocate that Congress guarantee a *particular result*, only a *particular process of consideration* for passing new federal criminal laws or changes to existing ones. The legislative branch of government should adhere to the basic constitutional principle of federalism, while conserving limited criminal justice resources and scarce tax dollars by insisting on a federalism/cost-benefit assessment for all crime policy proposals.

Crime Policy Impact Statements: A Model of Federalism, Facts and Efficiency

Congress should exercise at least the same degree of care and restraint in its crime policy decisions as it requires of the executive and judicial branches of government. "Fair and well-reasoned legislative (first branch) restraint is every bit as critical as fair and well-reasoned judicial (third branch) restraint."[11]

Under our Constitution, the *states* are supposed to have primary jurisdiction over crime. As noted above, when Congress unnecessarily "federalizes" state crimes, it wastefully duplicates taxpayer-financed state law enforcement, prosecutorial, and judicial efforts. Further, it floods the federal courts with cases that do not belong there, effectively closing the federal courthouse doors to civil litigants — individuals and business entities. Unrestrained over-federalization of criminal laws subverts the fundamental constitutional system of federalism, or state and local government prerogatives. All too often, it does this with no appreciable, positive impact on the crime problem that the federal proposal was supposed to alleviate.

Another disturbing trend to emerge in the last decade or so is an almost whimsical federal criminalization of *administrative and regulatory transgressions*, often at great cost, unfairness, and of negligible effect. Virtually every federal regulatory scheme these days comes equipped with a criminal law appendage, whether the regulated activity concerns the environment, the securities industry, employee pensions and welfare plans, or the employment of immigrants. Federal regulations triggering criminal liability are now numerous, complex, and typically vague — provoking concerns that the federal criminal law is being transformed from a scourge for wrongdoers into a trap for the unwary or negligent. Indeed, the web of criminal federal regulations has "grown so dense that many observers believe compliance with the law is unachievable."[12]

Regulatory offenses targeting corporations have especially proliferated in the past few years. Often, the harm could be redressed as well — if not better — by private lawsuits or government-initiated civil administrative proceedings.

Certainly, there are also unintended but foreseeable adverse consequences to the criminal justice system from some non-criminal law decisions. Deregulation of the savings and loan industry, for instance, has encouraged risk-taking that often veers afoul of the federal criminal code. This carries substantial costs for both state and federal criminal justice systems, which have to absorb the effects, without additional revenues or other resources with which to respond in a balanced fashion. Congress does not appear to have even contemplated the fallout to the criminal justice system, nor

the resource-skewing effect from this and other of its regulatory actions.

We propose a model for congressional decision-making which will assure a higher degree of care, and fewer negative, unintended consequences for the entire criminal justice system. We have considered whether this model should cover legislative proposals which are not criminal justice initiatives *per se*, but which also could well carry profound consequences, such as those in the regulatory arena. We have chosen to describe a narrow, focused model as the most manageable and justifiable, at least as a starting point for discussion. At some point, however, after a period of experimentation with the narrow proposal, Congress may want to expand the concept to cover more — if not all — of its legislative decisions which may have a discernible connection to the balance and effectiveness of the criminal justice system. We have also considered whether this model should apply not simply to new crime policy proposals, but also serve as a guideline for re-examining current federal criminal laws and programs. For now, we think this is too ambitious. We have decided to focus our model narrowly, as a model for new proposals. Perhaps at some point our proposal could also provide a helpful model for congressional re-examination of the current federal criminal code and accompanying programs.

We urge Congress to exercise needed restraint and additional care in crime legislating. All crime policy proposals should be accompanied by a Crime Policy Impact Statement (CPIS) comprised of two types of assessments, before the measure can receive floor time and a vote in either house of Congress. The CPIS would consist of: (1) a Federalism Assessment (FA), and (2) a Crime and Economic Cost/Benefit Assessment (CBA).

Federalism Assessment (FA): Long Range Plan Criteria

During the last half century, laws passed by Congress have created more and more claims that must be heard in the federal courts of (supposedly) limited jurisdiction. Increasingly, Congress has strayed from the basic constitutional principle of restraint in its crime policy-making. Matters that can be adequately handled by states *should be left to them.* Only those matters which cannot be so handled should be undertaken by the federal government.[13]

The rampant over-federalization of criminal law suggests that the legislative branch is not seriously considering whether the states are doing an adequate job in a particular area before rushing in with costly, inefficient, new proposals unduly concentrating police power in the federal government agencies — at an ever greater expense to taxpayers and with little or no appreciable benefit.

As part of the FA aspect of the CPIS, Congress should adopt the *Long Range Plan* standards recently adopted, after much study, by the United States Judicial Conference. Recommendation 1 of the *Long Range Plan* states:

> Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.[14]

The *Long Range Plan* specifically recommends what sort of *criminal matters* Congress should create, expand and fund as part of the federal government's reach. It correctly notes that the federal courts should have criminal jurisdiction in only five types of cases:

(1) offenses against the federal government or its inherent interests

(2) criminal activity with substantial multi-state or international aspects

(3) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise

(4) serious, high-level or widespread state or local government corruption

(5) criminal cases raising highly sensitive local issues.[15]

As Chief Justice Rehnquist recently said: "If we look at some recently passed federal legislation, and some currently pending legislation [namely, the pending juvenile crime bills], we can see that it does not come close to meeting these criteria."[16] Just as it insists with respect to federal *executive* and *judicial* branch activity, Congress must carefully restrain itself through discipline and/or legislation ensuring that all crime policies are subject to careful consideration according to these sound criteria.

Crime and Economic Cost/Benefit Assessment (CBA): Evolution of Criminal Justice Impact Assessment Standards

18 U.S.C. § 4047 was enacted as part of the 1994 Crime Act. It calls for *prison impact assessments to accompany crime proposals.* Clearly, its passage reflects a special concern about one particularly expensive cost of current federal crime policy: prison costs. This statute seeks to focus Congress on the increasing costs of processing and imprisoning defendants through the federal criminal justice system.

Section 4047 is an important step in the right direction. But it is too feeble to be effective. First, it applies only to legislation submitted by the judicial or executive branches of government and to those matters about which Congress requests information. It does not apply to Congress's own legislative proposals, which comprise the vast majority of lawmaking. Moreover, it is effectively only *aspirational.* It seems to be honored mostly in the breach. And there is



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GERALD LEFCOURT *is Immediate Past-President of the National Association of Criminal Defense Lawyers.*



WILLIAM MURPHY *is Immediate Past-President of the National District Attorneys Association.*

The opinions expressed in this article are those of the authors, and do not necessarily reflect the official positions of the organizations they represent.

no remedy for violations — no "teeth" to ensure congressional compliance.

While 18 U.S.C. § 4047 needs to be expanded and made enforceable in some meaningful manner, it remains a very good starting point for discussing our specific proposal. The statute currently provides:

(a) Any submission of legislation by the Judicial or Executive branch which could increase or decrease the number of persons incarcerated in Federal penal institutions shall be accompanied by a prison impact statement (as defined in subsection (b)).
(b) The Attorney General shall, in consultation with the Sentencing Commission and the Administrative Office of the United States Courts, prepare and furnish prison impact assessments under subsection (c) of this section, and in response to requests from Congress for information relating to a pending measure or matter that might affect the number of defendants processed through the Federal criminal justice system. A prison impact assessment on pending legislation must be supplied within 21 days of any request. A prison impact assessment shall include:

(1) projections of the impact on prison, probation, and post-prison supervision populations;

(2) an estimate of the fiscal impact of such population changes on Federal expenditures, including those for construction and operation of correctional facilities for the current fiscal year and five succeeding fiscal years;

(3) an analysis of any other significant factor affecting the cost of the measure and its impact on the operations of components of the criminal justice system; and

(4) a statement of the methodologies and assumptions utilized in preparing the assessment.

(c) The Attorney General shall prepare and transmit to Congress, by March 1 of each year, a prison impact assessment reflecting the cumulative effect of all relevant changes in the law taking effect during the preceding calendar year.

We propose that Congress revise 18 U.S.C. § 4047 to make it applicable to *all* criminal justice policy proposals.

Proposed Revision to 18 U.S.C. § 4047: Congressional Crime Policy Impact Statements

Our proposal for a revised Section 4047 is this:

Any submission of criminal justice legislation, whether to create new federal laws or expand, reform or alter the procedures or penalties for existing federal offenses, or to increase or revise criminal justice grant or other money schemes, must be accompanied by a Crime Policy Impact Statement. The Crime Policy Impact Statement must be supplied within 21 days of any request for a vote on the pending criminal justice policy measure.
(a) The Crime Policy Impact Statement shall consist of a Federalism Assessment in accordance with subsection (b), and a Crime and Economic Cost/Benefit Impact Assessment in accordance with subsection (c).
(b) The sponsors of crime proposals shall, in consultation with the Administrative Office of the United States Courts, the General Accounting Office, and any other relevant sources chosen by the sponsors, prepare and furnish a Federalism Assessment.

(1) A Federalism Assessment shall state whether and how the proposal meets the federalism principles, with cites to any data, analysis, or assumptions made which support the federalism impact conclusions of the assessment.

(2) The Federalism Assessment shall state which, if any, of the following federalism principles is satisfied by the crime policy proposal:

(i) an offense against the federal government or its inherent interests;

(ii) criminal activity with substantial multi-state or international aspects;

(iii) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise;

(iv) serious, high-level, or widespread state or local government corruption; or

(v) criminal cases raising highly sensitive local issues.

(c) The sponsors of crime policy proposals shall, in consultation with the Administrative Office of the United States Courts, the United States Sentencing Commission, the General Accounting Office, and other relevant state, local and federal government sources, prepare and furnish a Crime and Economic Cost/Benefit Impact Assessment (Cost/Benefit Impact Assessment). The Cost/Benefit Impact Assessment shall reflect consultation with a wide variety of state, local and federal stakeholders in the criminal justice system, including, but not limited to, state attorneys general, state and local prosecutors, state judiciary, the private and public defense bars, mayors and governors, state and federal law enforcement and corrections officials.

(1) The Cost/Benefit Impact Assessment shall provide an analysis of the exact impact the proposal is expected to have on the crime problem to which it is addressed, with cites to any data, methodologies and assumptions used in such analysis.

(2) The Cost/Benefit Impact Assessment shall also provide an economic cost assessment, with cites to any data, methodologies and assumptions used in the analysis supporting the impact conclusions drawn by the legislative sponsor(s), regarding the cost conclusions. This economic cost assessment shall include:

(i) a statement on the estimated impact of the legislation on state, local and federal law enforcement, prosecutorial and defender services, court, probation, and prison supervision personnel and populations;

(ii) an estimate of the fiscal impact of such state, local and federal law enforcement, prosecutorial and defender services, court, probation, and prison supervision personnel and populations, on federal, state and local tax expenditures for the current fiscal year and five succeeding fiscal years;

(iii) an analysis of any other significant factor affecting the cost of the measure and its impact on the operations of components of both state and federal criminal justice systems, including, but not limited to, prosecution costs, defender services costs and court costs; and

(iv) an analysis of how the legislation might affect the number of defendants processed through the federal criminal justice system and how any costs associated with an increase in such defendants will be covered.

(d) The Attorney General and the Administrative Office of the U.S. Courts shall prepare and transmit to Congress, by March 1 of each year, an Annual Crime Policy Impact Statement, reflecting the actual cumulative effect of all relevant changes in the federal criminal law taking effect during the preceding calendar year. These reports shall reflect consultation with a diversity of those involved in the criminal justice system, including but not limited to state attorneys general, state and local prosecutors, state judiciary, the private and public defense bars, mayors and governors, state and federal law enforcement, and corrections officials.

Enforcement Mechanism

Congress should codify the above policy-making guidelines along the lines of the current 18 U.S.C. § 4047. Making the CPIS a requirement for any crime proposal to receive floor time and a vote (*i.e.*, passage), is necessary to ensure that the assessment requirements are not ignored without remedy or enforcement. A standing rule in both the House and Senate should accompany, and provide the ultimate teeth for the legislation's time and content requirements.

It is clearly established that there is no general citizen or taxpayer standing to enforce laws such as 18 U.S.C. § 4047.[17] At best, Congresspersons might enjoy standing to enforce the statute, but not an individual citizen or citizens' advocacy group. This differs somewhat from the environmental statutes, where it is possible for a direct injury to be threatened against individuals and groups, and thus, for the standing requirement to be satisfied for citizen enforcement of the laws in court. There is no such taxpayer injury/standing available under cost/benefit deliberation laws such as Section 4047. Thus, Congress must secure its own adherence to the crime policy impact statement model of consideration. For the CPIS requirements to be meaningful, an *internal incentive* for enforcement must be utilized. We suggest that Congress insist upon Crime and Economic Cost-Benefit Assessments (CBAs) as the price of floor vote, because no other internal enforcement mechanism appears workable.

Conclusion

Although it regularly insists upon restraint from the other two branches of government, we believe that Congress too often fails to restrain itself in the area of crime policy-making consistent with basic constitutional and economic principles — contrary to the best interests of the very nation and citizens it is supposed to protect. The unmistakable consequences include:

➢ waste of tax dollars

➢ undue and inefficient duplication of regulatory and administrative proceedings, as well as often superior state and local law enforcement systems

➢ interference with and evisceration of state and local government prerogatives at the expense of fundamental checks and balances

➢ crippling of the federal courts' ability to fairly administer criminal and civil justice for all citizens, and

➢ unwise concentration of law enforcement power in federal agencies, which threatens individual rights and liberties.[18]

The time has come for Congress to adhere to a carefully crafted set of cost-benefit/federalism impact principles in considering crime proposals. This appears to be the only way to ensure a sensible and efficient national crime policy — one that comports with the intent of the Constitution. The American people deserve no less.

NOTES

1. William H. Rehnquist, 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY (Jan. 1, 1999), at 4-5. *See also e.g., Rehnquist Blames Congress for Courts' Increased Workload*, WASH. TIMES, A6, (Jan. 1, 1999).

2. American Bar Association (Criminal Justice Section), Task Force on the Federalization of Criminal Law, THE FEDERALIZATION OF CRIMINAL LAW (hereinafter Meese Report). The members of the Task Force were selected with the explicit goal of including persons with diverse political and philosophical backgrounds. In addition to Chairman Meese, who currently holds the Ronald Reagan Chair in Public Policy at The Heritage Foundation, the members of the Task Force are: LSU Law Professor John S. Baker, Jr.; Duke University Law Professor Sara Sun Beale; Arizona Court of Appeals Judge Susan A. Ehrlich; Charleston, South Carolina Police Chief Reuben Greenberg; former US Senator (and Alabama Supreme Court Chief Justice) Howell Heflin; Harvard Law Professor (and former Deputy Attorney General) Philip Heymann; Nashville, Tennessee District Attorney Victor S. Johnson, III; former congressman Robert W. Kastenmeier; Principal Associate Deputy Attorney General Robert Litt; Chief Watergate Trial Counsel and U.S. Attorney (M.D. Tn.) James Neal; Second Circuit U.S. Court of Appeals Judge (and former U.S. Attorney (D.Conn.)) Jon O. Newman; former U.S. Attorney (S.D.N.Y.) Otto Obermaier; former Chief Executive of the Law Enforcement Assistance Administration Donald Santarelli; former Chair, ABA Criminal Justice Section, William W. Taylor, III; former U.S. Attorney (C.D. CA), Federal Public Defender (C.D. Ca.), Los Angeles District Attorney, and California Attorney General John K. Van de Kamp; the Reporter, Temple University Law School Professor James Strazzella; and the statistical consultant, Dr. Barbara S. Meierhoefer.

3. Meese Report at 3.

4. *Id.* at 20, 22.

5. *Id.* at 35-36.

6. *Id.* at 41-42, quoting Conference of (State Supreme Court) Chief Justices, Resolution IX (Feb. 10, 1994).

7. National Governors' Association, Policy HR-19, *Federalism and Criminal Justice* (revised 1996), *quoted in id.* at 42.

8. *See e.g.*, Edwin Meese III & Rhett DeHart, *How Washington Subverts Your Local Sheriff*, POLICY REVIEW (Jan-Feb. 1996), at 52-53 (regarding how the over-federalization of crime incurs unnecessary expense and undermines state experimentation with innovative approaches to the prevention of crime).

9. As Charles Meeks, Executive Director of the National Sheriffs Association, has put it: "[W]e're getting closer to a federal police state. That's what we fought against 200 years ago — this massive federal government involved in the lives of people on the local level." *Quoted in* Edwin Meese III & Rhett DeHart, *How Washington Subverts Your Local Sheriff*, POLICY REVIEW (Jan-Feb. 1996), at 51 ("Not surprisingly, many Americans are beginning to share this fear of the federal government" (citing recent polling data)). *See generally* Meese Report, *supra* note 2, at 26-35.

10. Meese Report, *supra* note 2, at 50, 53-54.

11. Judge Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, MISSISSIPPI COLLEGE L. REV. 14, no. 2, part 1, at 228 (part of symposium on the access-to-justice future of the federal courts, in light of current and increasing caseload crisis).

12. Timothy Lynch, *Polluting Our Principles; Environmental Prosecutions and the Bill Rights*, Cato Institute Policy Analysis No. 223 (Apr. 20, 1995). *See e.g.*, 15 U.S.C. 78ff (Securities Exchange Act criminal penalties); 18 U.S.C. § 664 and 18 U.S.C. § 1027 (fraud, conversion and embezzlement of pension monies and false statements); 8 U.S.C. § 1324a (criminal penalties for employment of illegal aliens).

13. *See* William H. Rehnquist, Remarks Before the American Law Institute, Washington, DC (May 11, 1998), at 4. *See also* William H. Rehnquist, 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY (Jan. 1, 1999), at 4-5.

14. Judicial Conference of the United States, LONG RANGE PLAN FOR THE FEDERAL COURTS, at 23 (Dec. 1995).

15. *Id.*

16. William H. Rehnquist, Remarks Before the American Law Institute, Washington, DC (May 11, 1998), at 4.

17. *See e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972).

18. *Compare e.g.*, Meese Report, *supra* note 2 (concluding that among the long litany of problems associated with the over-federalization of criminal law are an inefficient allocation of scarce resources; an undue and unwise concentration of police and prosecution power at the federal level; a debilitating impact on the federal judicial system; and a diversion of congressional attention from true federal crime issues).

Testimony
of
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Chairman Thompson and distinguished members of the committee, thank you for inviting me to testify today on the federalization of crime. My name is John Baker and I teach law at Louisiana State University, where I have been on the faculty for twenty-four years. Before teaching I clerked for a federal judge and served as an assistant district attorney in New Orleans. Later, during the Reagan Administration, I was a consultant to the Justice Department, the Separation-of-Powers Subcommittee of the U.S. Senate Judiciary Committee, and to the White House Office of Planning. I have taught and written in the areas of criminal and constitutional law; have argued regularly in the federal courts, including the United States Supreme Court; and have had the privilege of serving on the ABA Task Force which recently issued a report entitled The Federalization of Criminal Law.

The federalization of crime distorts the Constitution's structure of powers in at least three respects. I) The federalization of crime represents a usurping by the Congress of police powers, which the Constitution leaves in the states and withholds from the federal government. II) In the course of federalizing crimes, Congress has unnecessarily created so many uncertainties as to what is and is not criminal that federal courts are effectively defining crimes and thereby exercising Congress' exclusive legislative power. III) The Judiciary's interpretation of federal criminal statutes, which tends to be expansive, allows and even requires Executive branch agencies to prosecute individuals and corporations whose actions often are not clearly criminal and who would be prosecuted, if at all, before state court juries. These areas of constitutional concern are further discussed in the following three sections.

I. HOW THE FEDERAL GOVERNMENT HAS USURPED STATE POLICE POWERS

> The fundamental view that essentially local crime is, with rare exception, a matter principally for the states to attack has been strained in practice in recent years. Congressional activity making more individual, and essentially local, conduct a federal crime has accelerated greatly, notably in areas in which existing state law already criminalizes the same conduct. This troubling federalization trend has contributed to a patchwork of federal crimes often lacking a principled basis.
> ABA Task Force Report at 5.[2]

A. THE ACCLERATION IN CREATING FEDERAL CRIMES

The ABA Report reveals that "***More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.***"[3] (Emphasis added, italics in the original). Moreover, the pace has only accelerated during the 1980s and 90s.[4] "All signs indicate that the federalization trend is growing, not slowing, in fact as well as perception."[5] No one actually knows exactly how many federal crimes exist because it is impossible to get an accurate count. Previous estimates of approximately 3,000 federal crimes have become dated due to the surge in federal criminalization during the last sixteen years.[6] Depending on how one treats federal regulations, that number can skyrocket. Nearly 10,000 regulations carry some sort of criminal or civil penalty.[7] As the ABA Task Force Report puts it, "[w]hatever the exact number of crimes that comprise today's 'federal criminal law,' **it is clear that the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades.**"[8] (Emphasis added).

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If, despite the growth of federal criminal law, the states still prosecute all but a small fraction of criminal cases, it might seem that the federalization of crime has practically little effect, and is therefore of little concern. The point, though, is only partly that the claimed benefits of federalization are illusory. If federalization were simply ineffectual, it would only involve a waste of time and resources no worse than many other programs of the federal government. On the contrary, the overall ineffectiveness of federal criminal law vis-a-vis local crime only magnifies its dangerous potential. Although federal law enforcement has had very little impact on local crime, federal law enforcement agencies can "crush" particular persons and corporations on which they set their sights. As long as those being prosecuted are in fact guilty, the general public probably does not care much about the "technicalities" under the Constitution. As discussed in sections II and III, however, the uncertainties of federal criminal statutes, combined with broad interpretation, leaves everyone -- investigators, prosecutors, judges, juries, and potential defendants -- uncertain about what is and is not criminal. Such uncertainties endanger the innocent because they give federal law enforcement very great latitude in choosing its targets for investigation and possible prosecution.

Federal agencies have always been, and should be, more selective than state law enforcement in taking cases. As federal criminal law has expanded to the point of virtually duplicating state criminal law, however, that selectivity has become even more pronounced. With many more crimes to choose from than state law enforcement and many fewer federal courts than state courts, federal investigative agencies can concentrate tremendous resources on any chosen target. Fewer cases and more resources for their investigations mean that federal law enforcement can overwhelm all but the most financially powerful defendants.

The high degree of selectivity in federal investigations and prosecutions cannot be overcome simply by increasing the number of federal criminal trials. Already, federal courts are overburdened with criminal cases. Moreover, the nature and function of the federal judiciary within the constitutional system is such that the number of federal courts and judges cannot be much enlarged. When Congress votes more funds for criminal law enforcement, the increases in federal spending can produce more and more intense federal investigations, but not a proportionate increase in the number of prosecutions. Without increasing the percentage of criminal convictions that come in federal courts,[9] Congress has nevertheless greatly increased the presence and power of federal law enforcement by creating new federal crimes and increasing spending on federal law enforcement.

Every time Congress passes a new criminal statute or a federal court expands an existing one, the jurisdiction of federal law enforcement increases. Each increase means that some federal agency somewhere then has more power to investigate some conduct, or some aspect of that conduct, it could not have investigated otherwise. That investigative power will be used to determine for purposes of arrest or indictment whether there is probable cause to believe a crime has been committed. As a result of the surge in federal criminalization over the past two to three decades, the traditional notion that federal law enforcement agencies have only limited powers has ceased to reflect the reality. Instead, the working assumption has become that collectively the agencies of the Justice Department, Treasury, and the Postal Service can investigate anything and anyone they decide to.[10] Almost every kind of crime is potentially a federal crime.

B. THE CLAIMED CONSTITUTIONAL BASIS FOR FEDERALIZATION

Congress has generally used its power under the Commerce Clause as the basis for expanding federal criminal law. Congress does have plenary power under the Commerce Clause "to regulate commerce among the states." Unfortunately, Congress has confused its legitimate powers under the Commerce Clause with a general police power.

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1. THE COMMERCE CLAUSE AND POLICE POWERS

Congress' power to control commerce that concerns more than one state is complete and not subject to control by the states.[11] Congress is the proper forum in which to exercise a superintending power over commerce. In our federal system, the states cannot regulate cross-border activities because they have lost control over their borders. They cannot establish border checkpoints to admit or exclude persons and goods the way an independent, sovereign nation has the right to do. Under the Constitution, Congress can legislate, and often has done so, in ways that benefit (at least many of) the states when they themselves cannot do so because the Constitution elsewhere limits the powers of the states. For example, states with high labor costs want to retain their industries, but can neither directly prevent them from leaving nor impose import duties on products from other states as a way of protecting in-state companies. Through the Commerce Clause, Congress has regulated wages in ways that favor high-labor-cost states by eliminating the labor cost advantage that other states would otherwise be able to use to entice businesses to relocate to the low-labor-cost states.[12] Regardless of whether this makes for good economic policy, Congress can, within limits, use its power to regulate commerce in ways that benefit some states to the disadvantage of others. The power of states and the federal government over the liberty of persons, even fleeing felons, however, is much more limited than that the federal government's power to regulate 'commerce among the states.'[13]

Distinguishing between Congress' power under the Commerce Clause [14] and the states' police power has been a recurring problem for the Supreme Court. Chief Justice Marshall, who is said to have first used the term, described the police powers as the residual sovereign powers of the state, and was clearly referring to *local* police powers.[15] The later rise of a *national* police power was a different matter. Police powers have always been identified as inherent powers of sovereignty. The federal government was not considered to have a general police power because the federal government would thereby have ceased to be a government of limited powers as intended by even the most nationalistic of the Founders. The later development of a national police power concept was related to 1) using the Commerce Clause to turn the violation of regulations into crimes; and 2) ignoring the normal criteria for true crimes.

2. CONFUSING REGULATION OF COMMERCE AND PUNISHING CRIME

The federalization of crime through the Commerce Clause has been made possible in large part by failing to distinguish between *regulating commerce* and *punishing crime*. During the second half of the 19th century, Congress and the individual states began to apply criminal sanctions to economic regulations.[16] Notable examples included the Interstate Commerce Act[17] and the Sherman Anti-Trust Act.[18] These "regulatory" offenses differed from "true" crimes, as has since been recognized, in that they did not involve moral stigma, but were designed to force compliance with the regulations.[19] The Supreme Court, however, did not make such distinctions when addressing the Commerce Clause in the 1890s and later.[20]

Indeed, in the first significant Commerce Clause case related to crime, *Champion v. Ames*,[21] the Court confused regulating commerce and exercising the police power. Congress had enacted legislation to protect states where gambling was prohibited (which was all but one) by prohibiting the shipment of lottery tickets across state lines. Congress did not outlaw gambling or the sale or lottery tickets; it merely prevented the movement of lottery tickets from the one state where they could be legally purchased into other states. The Supreme Court upheld the act as a constitutional regulation of commerce in lottery tickets by restricting their sale within the borders of the one state. Unfortunately, the Supreme Court went further and posited a general police power in Congress to criminalize certain conduct.[22] As I have explained in greater detail elsewhere,[23] the Supreme Court's decision initiated confusion between Congress' undeniable power to regulate commerce among the states and the police power of defining, prosecuting and punishing crime.

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By 1909-10 the body of federal criminal law had incorporated the notion of a national police power to protect the general welfare.[24] In practice, however, national police powers did not greatly expand because the Supreme Court maintained a restrictive interpretation of the Commerce Clause. The one major assertion of federal police power occurred with Prohibition, and required an amendment to the Constitution.[25] That disastrous experience probably cooled, for a number of years, the enthusiasm that otherwise might have existed for increasing federal criminal powers.

During the Roosevelt administration in the 1930s, Congress heavily regulated the economy under the Commerce Clause. After some cases voiding key components of the New Deal, the Supreme Court eventually validated most of this regulation, laying the groundwork for the later expansion of national police powers.[26] Still, congressional inertia and concerns for federalism inhibited rapid expansion of federal criminal law and jurisdiction. That changed about 1970, when Congress and the Executive branch began to show greater willingness to extend the federal police power into areas of traditionally local concern due to mounting public pressure for the government -- state or federal -- to "do something" about crime, with little thought about federalism.[27]

When Congress began to federalize more crimes, it relied on the fact that since the famous 1937 case of *NLRB v. Jones & Laughlin Steel*,[28] the Supreme Court had -- until *U.S. v. Lopez* in 1995[29] -- upheld virtually every congressional act under the Commerce Clause. The vast majority of cases at least involved commerce, not crime. Nevertheless, prior to *Lopez*, the Court had not invalidated any federal criminal statutes under the Commerce Clause, even though it tended to give narrow constructions to federal criminal statutes, prior to 1970.[30] With *Perez v. United States* in 1971,[31] the Court seemed to allow Congress as much deference defining and federalizing crime as it had been on regulations of commerce. In *Perez* the Court upheld application of a federal "loan-shark" statute to local acts without any showing of any relation to interstate commerce. The Court considered it sufficient that the activity was part of a class of activities that Congress had targeted as having affected commerce through organized crime.

Perez opened the way for Congress to expand federal criminal law into the domain of the states. If *Perez* was simply the logical extension of prior cases, then the principle had been extended beyond the limits of the logic. *Perez*'s significance was reflected by the comments of an old New Dealer, Robert Stern, who years before had worked to have the Supreme Court expand its interpretation of the Commerce Clause.

> Whether or not such an enlargement of federal power is cause for worry, it does not appear that anyone is worrying much about it. So far as can be ascertained, *Perez* is practically an unknown case, except for constitutional law professors -- and, of course, government prosecutors and lawyers defending loan sharks. It has attracted little publicity or attention in the literature. It apparently surprised no one. The Court's opinion dealt with the subject cryptically, almost superficially, even though no case would seem to have gone that far in upholding the federal commerce power.
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> Even a lawyer who fought for a realistic interpretation, which would recognize that in commercial matters the United States was one nation, finds himself surprised at where we are now -- and at how readily the recent expansion is accepted.[32]

C. THE NEW FACE OF FEDERAL LAW ENFORCEMENT: DRUG, COMMERCIAL, AND VIOLENT CRIMES

With apparent approval from the Supreme Court, federal law enforcement has focused increasingly on local crime since 1970. Of current federal prosecutions, the greatest number of cases

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involve drugs; the second highest are cases involving commercial fraud; and for the first time federal law enforcement has targeted run-of-the mill street crime by using federal gun-control statutes. All three areas properly belong to the states and threaten to undermine not only state authority, but also to swamp the federal courts system.

1. DRUGS: DISTRIBUTION VERSUS POSSESSION

Drug crimes are a good example of how regulating commerce and punishing crime have become commingled. The federal government certainly should, and does, have a major role regarding drugs, a matter of great concern to the American people. That does not necessarily mean its criminal powers extend to the mere user of drugs who already falls within the jurisdiction of state criminal law. The federal government has the constitutional power to regulate drug trafficking, at least insofar as it relates to the flow of drugs crossing state and national borders. The states clearly have power to criminalize and prosecute drug distribution and use within their own borders. Given that most drug distribution originates outside the country, it is difficult to draw theoretical distinctions separating local from interstate and international drug trafficking. It is all part of a chain of distribution. As a result, state and federal law enforcement have coordinated their drug enforcement efforts.

The federal government has primary authority over the classification and regulation of drugs.[33] In terms of *regulation*, the federal government has ultimate control over drug policy as a matter of "regulat[ing] commerce among the states."[34] Nevertheless, while the federal government regulates and should interdict the *transportation* of controlled drugs, the states retain the *police power* over crime and they can, and should, prosecute most drug offenders.[35]

The main reason for federal involvement in the prosecution of drug offenses is that both state and federal prosecutors want to maximize the sentences and force guilty pleas by using federal law, which provides for longer sentences than many states do.[36] It is not everywhere true and not necessarily the case that federal law has longer sentences for drug convictions. Some years ago federal drug penalties were lower than those of many states and, even today, are lower than some states.[37] Nothing prevents the states individually from raising their own penalties for drug violations. If state penalties were higher than federal law provides, or if federal law did not provide criminal punishment for mere possession of drugs, then state courts would prosecute those cases. Indeed, even though federal drug prosecutions have greatly increased,[38] state courts still handle most of the drug cases, just as they do most criminal cases.[39] Those relatively few drug defendants prosecuted in federal court do receive stiffer sentences generally than those tried in state court,[40] but as noted below, it is much more costly to prosecute cases in federal court. Using federal prosecutions in this manner distorts the proper balance between state and federal governments and dispenses unequal justice in similar drug cases within a given locale.

2. CORPORATIONS AS CRIMINALS

Corporate executives and others who think such constitutional issues do not concern them should consider the dramatic demise of E.F. Hutton. The president of the former prestigious brokerage house later admitted that his decision agreeing to have Hutton plead guilty to federal fraud charges resulted in the firm's destruction. Too late, he regretted not fighting the indictment.[41] The company should in fact have gone to trial; the charges were very questionable given the law as it then stood. Nevertheless, on the advice of counsel the firm pled guilty. Apparently, the firm's management thought it would be less difficult and less expensive to plead, rather than to fight. Hutton apparently followed the conventional wisdom that it is preferable to suffer a few days of bad publicity from a plea, rather than weeks of bad publicity from a trial. The conventional wisdom, however, failed E.F. Hutton. After the plea, members of the media and Congress questioned why only the firm, and no individual, had pled guilty. The Justice Department defended the plea agreement by admitting it could not actually prove any individual had committed a crime. As a matter of common sense, although not necessarily of legal logic,

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it seemed to many that a corporation, as an abstract entity, could not be guilty of anything unless at least one of its agents committed a criminal act. Before its indictment, E.F. Hutton had been known for its advertisements built around the line: "When E.F. Hutton speaks, ... everyone listens." Since its indictment and conviction, Hutton has been silenced.

3. VIOLENT CRIME

The federal government's chief drug enforcement officials have recently admitted that attempts to control drug trafficking have thus far failed.[42] If the only thing federal law enforcement succeeds at is putting corporate executives in jail, eventually the public may realize that federal criminal law enforcement is not accomplishing much. Not surprisingly, therefore, the Clinton administration has been emphasizing what the federal government claims it can do to stop violent crime.[43] Such efforts are an unprecedented intrusion into state responsibilities that actually threaten to prevent federal courts from performing their primary functions under the Constitution.

The Justice Department is touting its crime-with-a gun program in the city of Richmond, Virginia,[44] as a model for other cities and a justification for more federal authority over local crime. News reports cite an impressive drop in violent crime[45] in an apparent attempt to justify the use of federal law enforcement in what is clearly local crime. Those reports, however, often fail to note that the national figures for violent crime have dropped dramatically as well,[46] and that criminal justice experts give different explanations for the decline.[47] Even the NRA, supposedly a conservative organization concerned about protecting liberty against federal intrusiveness, has endorsed and promoted the approach.[48] Nothing, however, about this joint federal-state program is beyond the ability of local law enforcement to accomplish on its own -- if it has sufficient funds either from the state and/or from the federal government and, of course, if a state is willing to increase its own criminal penalties. Again, this is a matter properly left to be decided by the citizens of the states through their legislatures.

If states made the necessary changes in their sentencing provisions, local prosecutors would not need federal law enforcement to achieve results similar to the Richmond program. Indeed, as one city adopts such a program, nearby cities will almost have to follow suit simply as a matter of self-defense against the criminals who leave one city in search of a city with less strict law enforcement. As criminals move to nearby areas, those cities are likely to experience an increase in crime, which puts pressure on officials in those other cities to adopt similarly strict responses to increases in crime. If enough cities within a state adopt a similar tough enforcement policy, they will effect changes that are statewide. While a state may prefer to abdicate its responsibility for law enforcement to the Justice Department, as apparently some in Virginia wish to do,[49] that course of action is simply not feasible for the entire nation. To do so would require a national police force comparable to that in each state, but multiplied by fifty, something which unfortunately Congress may be willing to do.[50]

There are those who advocate a substantial increase in the role of federal criminal law.[51] While federal police power has been and could continue to be increased, the federal government cannot produce much increase in the number of criminal convictions without collapsing the federal judicial system. In the last 30 years the number of federal prosecutors assigned to the U.S. district courts has grown from about 3000 to about 8000.[52] The number of prosecutors has risen far more quickly in that same period than the number of federal judges.[53] There are now about four federal prosecutors to every federal judge.[54] The number of federal criminal prosecutions has not, and should not, keep pace with the growth in prosecution.

The nature of the federal judiciary requires that the number of federal courts and be limited. Federal courts are relatively few for a number of reasons, constitutional and practical. Federal courts have limited jurisdiction under the Constitution; their role is to preserve and enforce federal law. Until recently, the federal courts dealt primarily with non-criminal cases, which had a constitutionally-related

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basis for being in a federal court. Now, federal criminal cases are delaying or crowding out important civil cases, which rightly belong in federal court. To make any dent on crime, the number of federal courts would have to multiply many fold, which is simply unacceptable for constitutional and practical reasons.[55] As a federal district judge from Richmond complained in a letter to Chief Justice Rehnquist: "Our court has been transformed into a minor-grade police court."[56] Transforming federal courts in this fashion would make each federal court and judge less significant, but all of them collectively would become much more powerful and bureaucratic.

The federal court system simply cannot handle the number of criminal cases it would have to in order to have any impact on local crime.[57] Even if the federal courts could handle a great increase, it is financially foolish to prosecute ordinary street crime in federal courts because, as the federal court in Richmond noted, **the cost to prosecute a federal case is at least three times** the cost of prosecuting a state case.[58] If more judges are needed, the constitutionally proper and financially sensible solution is for states to create more judgeships. States, however, may not want to spend the money.[59] If so, that is a matter for local officials and voters to decide. Whether the federal government should, instead of enforcing local crimes, pay for state personnel to enforce local criminal law involves other questions of federalism under the spending power,[60] which are not addressed here. But it would certainly be preferable, as well as less expensive, to have the federal government provide more funds to the states than to have the federal government continue to usurp state police powers.

II. LAW ENFORCEMENT WITHIN A FEDERAL SYSTEM

Despite the federalization of criminal law, the states retain their police powers and they remain primarily responsible for investigating and prosecuting most crimes. The United States government has primary or exclusive responsibility for only a limited category of offenses.[61] Given that "[t]he Constitution . . . withhold[s] from Congress a plenary police power," United *States v. Lopez*,[62] the United States has not had a national police force as such. The Constitution's failure to provide a general federal police power is neither accidental nor irrational; it corresponds to traditional American concerns about protecting the liberty of individuals. Contrary to some misconceptions, and despite its problems, state law enforcement not only remains quite capable of responding to local crime problems, but can do so much more effectively than federal law enforcement. In what follows, this statement A) describes the organization and functioning of state and local law enforcement, B) which accounts for 95% of all convictions C) within a federal system of inter-governmental cooperation.

A. THE ORGANIZATION OF STATE AND LOCAL LAW ENFORCEMENT

The strengths and weaknesses of state and local law enforcement result from its organization on a local basis. Efficiency experts may find much to fault in the criminal justice system, precisely because it is not systematized on any uniform basis. That critique, however, can be made against virtually any aspect of federalism, including the very existence of separate states. Experts in mergers and acquisitions can presumably make a case for why all state governments should be eliminated or centralized under the national government. In the opinion of the Founders, however, self-government is necessarily inefficient in that ordinary citizens, rather than only experts, participate in the business of government. The Framers built certain inefficiencies into the Constitution as protections for liberty. Even if efficiency were more important that liberty, nothing about the local crime problem suggests that centralization of power in federal law enforcement can produce greater efficiencies than the local organization of law enforcement. Certainly, from the perspective of citizens who are the victims of crime, local law enforcement needs to be the most efficient in protecting them.

Most crime is local in nature, even in a very mobile society. The basic crimes are fundamentally the same as they have been for hundreds of years: murder, rape, robbery, burglary and theft. These crimes, often called common law crimes, are crimes in every state. From these have come many

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variants, but even modern high-tech crimes are only modifications of the basic crime of theft. These basic crimes are as unchanging as human nature and have been around for all of human history. As long as human beings live together in society, the evil of crime will be with us. That is not to say that crime cannot be reduced, but only that it will not be entirely eliminated.

Crime is first a family and then a community problem. Much of the crime begins with juvenile perpetrators and continues as they grow into adulthood. This fact reflects failures within the family, where children either are or are not taught to respect other persons and their property. While not all crimes are attributable to breakdowns in family discipline, a general decline in family discipline certainly contributes to crime in society.[63] As the recent return to community policing demonstrates,[64] the prevention and the detection of crime occurs neighborhood by neighborhood, that is, among groups of families.[65] Traditionally, police stations have been located throughout a city. Before automobiles and for a long time thereafter, police generally patrolled on foot. Later, most officers came to patrol in squad cars. Today, centralized police departments of large cities are rediscovering the wisdom of returning police to walking the streets.[66] The most effective police departments now allocate officers on the streets based on their understanding of the neighborhoods on a precinct basis.[67]

Victims naturally desire and expect quick response to reports of crime, especially when one is still in progress. That kind of response requires police to be located nearby. Even so, local police rarely arrive until after completion of the crime either because the suspect flees or, more frequently, the victim discovers the crime only after the crime has been completed. The chances of apprehending the criminal diminish as time passes.

Crime control, of course, requires more than patrolling police officers; those officers require various forms of support. When a suspect is not immediately apprehended, and even when one is, clearing the crime often occurs only after additional investigation (e.g., photo or line-up identification, fingerprinting, DNA and other scientific testing). Police departments of any size consequently have detective bureaus and other specialized units to concentrate on particular crimes such as homicide, armed robbery, or drug offenses.

The organization of police departments varies not only from state to state, but from city to city within the same state, depending on the size and characteristics of each city or county. In large cities, law enforcement gives high priority to violent crimes. Other crimes, such as non-violent theft, may receive less attention than they would in a smaller community. The variations in local needs means that police agencies should not be organized along a uniform model, even within a single state.

Once the police (or sheriffs' department) does arrest a person or make a case before an arrest, the matter moves to the district or state's attorney and the courts. Again, the states have different approaches in organizing this aspect of law enforcement. Due to the close connection between the prosecuting function and the courts, prosecutors normally operate at the county court level. Generally, county district attorneys have primary control over the prosecution of cases, although a state's Attorney General usually has at least some authority to initiate or intervene in prosecutions.[68] However organized, prosecutors' offices and the courts are centralized in one (or two) places within a city or county.

When cases go to court, the victims, witnesses, and jurors probably travel further than they would in order to reach their local police station. This centralization within a county promotes efficiency, but at a cost in terms of convenience to victims and witnesses. Locating courts in each county, however, involves decentralization vis-a-vis the state and less inconvenience for all involved than they would experience if victims, witnesses, police, attorneys and others had to travel to a single state-court location.

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Each state thus determines for itself the organization and distribution of police, prosecutors, and courts according to local conditions and the preferences of its citizens. As federal funding of local law enforcement has grown, however, Congress and the Justice Department have increasingly dictated priorities to the states.[69] While federal authorities do so in the name of "protecting the public," in actuality no single "public" exists when it comes to matters of crime. As the Founders viewed the matter, and as most Americans probably still do, the focal point for protection is each particular local community. As elaborated in section III, the organization of courts on a county basis reflects the traditional understanding of the jury as an instrument of local community justice.[70]

B. STATE AND LOCAL PROSECUTIONS ACCOUNT FOR 95% OF ALL CONVICTIONS

Very few crimes actually result in a conviction and most convictions adjudge the defendant guilty of something less than the original charge(s). In part this results from the fact that many crimes go unreported.[71] Routinely, victims do not bother to report minor crimes such as vandalism and petty theft. Victims of certain crimes, notably rape and employee theft, frequently fail to report for fear of publicity. Of all the crimes actually reported, only twenty-one percent (21%) result in an arrest.[72] Of those arrested for felonies, thirty to fifty percent (30-50%) are refused or "screened out."[73] Of those charged, fewer than fifty percent (50%) will result in conviction for any crime, whether by plea or trial.[74] In other words, only about two to three percent of reported crimes result ultimately in any conviction. Nevertheless, although the number of convictions relative to the number of crimes is low, **state and local prosecutions account for 95% of all convictions.**[75]

The low conviction rate relative to the number of crimes committed does not mean that most criminals get away completely. Most crimes are committed by a small number of criminals,[76] sometimes referred to as "career criminals."[77] By the time such a person is arrested, he may have committed countless crimes. Most of the crimes he committed will not actually be charged, for various good reasons. Local police officers often have had considerable contact with persons they later arrest. Police may have evidence of some crimes committed by the arrestee, but may not know of all of his crimes. They may suspect him of being responsible for crimes for which they have insufficient evidence. An investigating officer who has evidence of one crime may not consider it productive to devote additional time and resources to trying to gather more evidence of these other crimes, as long as the arrestee gets convicted for something. When the police attribute other crimes to an arrestee (with or without adequate evidence), they "clear" those cases, i.e., consider them solved, even though not prosecuted. Even if they do have sufficient evidence of other crimes, the police may not charge them pending the outcome of the crime(s) charged.

A prosecutor reviews and decides whether or not to accept some or all of the charges. The process of accepting some and refusing others involves various degrees of "screening."[78] The extent of screening varies from jurisdiction to jurisdiction. In some jurisdictions, the prosecutor's office accepts most charges for prosecution with little investigation beyond what the police provide. In others, the prosecutor's office does its own review of the evidence, including interviews with the victims and witnesses. As a result of screening, the prosecutor may refuse some or all charges against an arrestee.

Of the reasons for screening out charges, an insufficiency of evidence is certainly the most legitimate. The police frequently "overcharge," -- although not necessarily intentionally -- by filing more or more serious charges than are justified by the evidence. A prosecutor's view of the strength of the evidence often differs from the assessment of the arresting officer. Making decisions about prosecution is not a science; it varies somewhat from lawyer to lawyer, depending on one's experience and judgment. Even when the evidence is strong against a person, other factors such as the arrestee's young age, lack of previous record, or cooperation with police, legitimately affect a prosecutor's decision to dismiss or divert, rather than to prosecute.[79]

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In those jurisdictions where prosecutors "screen out" a very high percentage of cases, they do so largely because they think most of those cases are not be "winnable" at trial.[80] Although the evidence presented by the police may amount to "probable cause," which is sufficient to charge, the prosecutor may nevertheless conclude that the evidence is insufficient to prove the case at trial where the standard is proof "beyond a reasonable doubt."[81] Many police officers do not appreciate the difference and sometimes attribute the refusal of charges to illegitimate motives on the part of the prosecutor. Victims and witnesses may have a similar reaction. For elected local prosecutors, this means they need to set and communicate their policies in ways that maintain the confidence of the public, if they expect to be re-elected.

Local prosecutors have to contend with the fact that many, if not most, law-abiding citizens have the unrealistic notion that prosecutors should prosecute all cases presented by the police. Where prosecutors do so, they must do a great deal of plea-bargaining or risk losing many of those weak cases at trial. Where the screening of cases is inadequate, trial prosecutors have to cope with more and weaker cases than they should have. Somehow, they must dispose of all the indictments, either by trial, plea, or dismissal. They cannot try all the cases. Prosecutors naturally prefer to plea-bargain weak cases, rather than dismiss them or risk an acquittal. Of course, if the evidence raises real questions about the defendant's guilt, the case should be dismissed. Assuming the evidence, although not as strong as the prosecutor would like, does indicate the defendant's guilt, the prosecutor justifies the plea bargain as at least some conviction of a guilty defendant.

Few people appreciate the relationship between screening and plea-bargaining. The public does not like either. The term "plea bargaining" gives the impression that the guilty are getting a "deal." And in many cases, defendants are getting a deal simply because the prosecution cannot try all the defendants who have been indicted. Where more screening is practiced, the pressure to plea-bargain should be less than it would be otherwise. The pressure of too many cases, some of them too weak to try, means that prosecutors do "deal" cases against guilty defendants that might have been won at trial. It is impossible to say what percentage of the guilty pleas are in fact real "deals" for the defendants. Overall, however, about ninety percent (90%) of all convictions result from a plea rather than a trial,[82] with that rate varying from jurisdiction to jurisdiction, depending on -- among other things -- screening.[83]

Screening and plea-bargaining involve significant policy choices left to the discretion of the prosecutor. Local prosecutors must screen and plea bargain to varying degrees because they do not get to choose their cases. They must respond in some way to all criminal cases brought to them, which means virtually all arrests made within their jurisdictions. Although local prosecutors within the same state will follow different policies on screening and plea-bargaining, each must answer to the local electorate. Thus voters are able to influence those policies on screening and plea-bargaining in ways voters cannot influence appointed federal prosecutors.

C. LAW ENFORCEMENT COOPERATION WITHIN A FEDERAL SYSTEM

Just as the Constitution provides for unelected federal judges to adjudicate cases free from local political pressure, it is appropriate that federal prosecutors not be directly influenced by local political sentiment, with an important caveat. The constitutional rationale for federal powers also explains the nature of the limits on federal powers. Any power the Constitution gives to the federal government can be limited in practice only by Congress, not by the states. For our federal system to remain one of limited powers, the federal government is obligated both to use its enumerated powers, as necessary and proper, to protect federal interests and to override state powers only when they conflict with the exercise of a valid federal power. The very detachment of federal agencies from local popular sentiment is necessary for them to perform their role; that same detachment, when applied to matters left to popular control, undermines the balance struck by the Constitution's system of self-government.

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The Federal government certainly has an important role in protecting the public. That role falls within its enumerated powers under the Constitution. Its most important duty, one that only it can execute, is the defense of the country against foreign aggression. Principally, such aggression and our response to it has been military. Foreign aggression, in and outside of war, also takes the form of espionage. When espionage occurs within the United States, such aggression becomes a law enforcement problem. As a nation, however, we have traditionally drawn the distinction, which some nations do not, between the military and law enforcement and between external and internal threats to peace. Unlike some nations, the U.S. does not use military force to maintain the peace at home.[84] Only in the case of domestic violence (as opposed to insurrection against the United States or invasion of a state or the United States) does the Constitution provide for the use of federal power to maintain order within the states -- and then only at the request of a state's legislature (or, if the legislature cannot be convened, of the state's governor).[85]

The legitimate law enforcement powers of the federal government are not limited to cases of espionage and insurrection, however. From the beginning of the nation, it has been clear that the federal government can use "necessary and proper" means, including law enforcement, to protect the federal government itself, namely its property, its personnel, its functions, and the areas of land -- i.e., national parks, territories, and the District of Columbia -- over which it has exclusive jurisdiction. Any attack on a federal building or federal officers, such as occurred in the Oklahoma City bombing in 1995, properly falls within the jurisdiction of the federal government, even though the crime also falls within the jurisdiction of a state.

The nature of the federal system is such that some legitimate overlap will necessarily exist between federal and state law on criminal law matters. Confusion naturally arises as to how to differentiate between what is properly federal and what is properly left to the states. There can be no doubt, however, that in the current state of affairs, federal criminal law has gone well beyond any legitimate overlap; it now almost completely duplicates state criminal law.[86] This duplication has developed due to the failure of Congress to distinguish a) the federal power to **define** crime from the power to **investigate and prosecute** crime, and to further distinguish b) the **investigation and prosecution of crime** from the **regulation of commerce**.

In matters that are exclusively federal, ranging from offenses against the Postal Service to those against the President, the federal government both defines the crime, which the Congress does; and investigates the crime, which the Executive branch does. Theft from the Postal Service would simply be theft under state law and assassination of a president would be murder under state law. That the federal government has exclusive control over the definition and investigation/prosecution of these matters (although it may request, but not require, the aid of state law enforcement)[87] in no way infringes on state powers. For most crimes, however, the Constitution leaves the power of definition and investigation to the states. Just as the federal government may ask for state assistance in investigation, so too the states may request the investigative assistance of the federal government under certain circumstances. As already noted, the Constitution does provide that a state can request the assistance of the federal government to protect it against domestic violence, but such instances have been rare.[88] Federal assistance has been more common in criminal matters which cross-state lines. In these matters, however, there has often been a failure to distinguish between **investigation** and **prosecution of crime** and between **prosecution of crime** and the **regulation of commerce**.

While criminal investigation is principally the responsibility of the state in which the crime occurred, the nature of the federal system presupposes certain kinds of cooperation among the states and between the states and the federal government. The Constitution's extradition clause[89] requires the states to assist one another in investigation by returning fugitives who have fled from one state to another. Otherwise, fleeing criminals could escape prosecution, since only the state where the crime occurred can

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prosecute for crimes occurring within its borders. When a criminal flees to another state and is apprehended there, the apprehending state cannot try the criminal for the offense that occurred outside its borders. A crime is an offense only against the state where the act occurred and which prohibited that act; therefore, only that state has jurisdiction to try the criminal for that crime.

Beyond extraditing persons charged with crimes, the Constitution neither requires nor prohibits other kinds of cooperation between state governments or between the states and the federal government.[90] Law enforcement agencies in different states routinely assist one another in investigations. Voluntary cooperation is consistent with each state retaining responsibility for exercising its own police powers. Congress can also provide for federal agencies to assist state law enforcement in ways that do not pre-empt the sovereign functions of state legislatures[91] nor co-opt state law enforcement.[92] Thus, under the Fleeing Felons Act,[93] passed in 1934, federal law assists local enforcement by imposing federal penalties on "roving criminals" who would be subject to extradition. The purpose was neither to deny nor interfere with state extradition, but merely to assist in the apprehension of fugitives. When the federal government assists in a state's **investigation** by searching for and returning a fleeing felon, it does so for **prosecution** by the state where the crime occurred. In these instances, the federal government assists states in a manner not unlike what the states do for each other through required extradition and sometimes through voluntary assistance. Providing such investigative assistance differs from assuming the responsibility for prosecution. Like the power to **define crime**, the power to **prosecute crime** is an essential and exclusive attribute of a government's sovereignty.

III. FEDERAL CRIMINAL LAW AS A THREAT TO THE INNOCENT

As the framework of the federal system has been forgotten, the federalization of crime itself has occurred, as previously described, under the Commerce Clause. In that process of transferring police power from the states to the federal government, Congress has also transferred or delegated much of its own legislative power to the federal Judiciary. Congress drafts so many criminal statutes with such uncertainty that federal courts effectively exercise Congress' legislative power of defining crimes. This failure adequately to define federal crimes greatly increases the potential for arbitrary law enforcement in ways that the federal courts would find violative of due process if done by state law.[94] Transfer of the power to define crimes from the states to Congress, from Congress to the federal judiciary, and from the federal judiciary to the Justice Department, means that some arbitrarily-selected defendants will be tried in federal court under the uncertain definitions of federal criminal law when they should be tried, if at all, under the clearer standards of state law, in state or local courts, by local juries.

A. CONGRESS TURNS REGULATIONS INTO CRIMES

The development of national police powers through the Commerce Clause has come about in part due to the failure to distinguish true crimes from regulatory offenses. True crimes carry a "moral stigma" because they indicate that the defendant knowingly did something wrong in that he consciously broke the law. Regulatory offenses, on the other hand, require or prohibit some act regardless of whether the defendant did so knowingly. Regulatory offenses, therefore, have not generally carried the same kind of moral stigma or public shame. The states and the federal government create regulatory offenses typically as part of economic regulation; they provide for the possibility of criminal sanctions in order to spur compliance.

The core element of federal regulatory offenses generally involves Congress' power under the Commerce Clause to regulate commerce. If a statute prohibits transporting certain goods across state lines, for example, the criminal sanction attaches to the interstate shipment, which is both the essential and the jurisdictional element of the statute. This was the situation in the previously discussed Lottery Case, *Champion v. Ames*.[95] In that case, regulations criminalized only the *transportation* of certain

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goods across state lines, not the manufacturing or use of those goods. More commonly today, though, Congress does create true crimes which are simply and often implausibly "hooked" to the Commerce Clause. Thus it was that Congress made it criminal (as states had already done) to possess a gun near a school based on the notion -- rejected by the Supreme Court in *U.S. v. Lopez*[96] -- that guns near schools had a substantial effect on interstate commerce. In doing so, Congress has combined, in a constitutionally questionable way, its separate powers to create crimes against federal interests with its power to regulate commerce affecting more than one state.

The essential difference between an exercise of Congress' power to enforce a regulation by use of criminal sanction and a supposed power to punish crimes involves moral condemnation.[97] While violation of a regulation of commerce, such as the Fair Labor Standards Act,[98] may carry a criminal penalty, such a violation is not generally thought of as a "crime." The "offense" lacks the moral turpitude of crimes such as murder, rape, theft, or even simple misdemeanors. It has been difficult to draw this distinction in practice between regulatory offenses which carry a possible penalty and true crimes, due to the interplay between constitutional and criminal law issues. The inclusion of commerce-based jurisdictional elements in federal statutes has confused both the jurisdictional and substantive issues, especially under the federal mail and wire fraud statutes. Is the essential core of the federal crime of mail fraud the use of the mails, or fraud, or both? If it is truly a crime, the essence is the fraud. If it is primarily a regulation, which was its original constitutional justification, namely a prohibition in the postal acts regulating the mails, then it is not truly a crime. Nevertheless, federal prosecutors and judges certainly treat these offenses as true crimes, as evidenced by their frequent use and substantial sentences.

Congress routinely confuses regulatory and criminal concepts in the process of justifying federal criminal laws. This explains much of the growth in federal criminal law directed at corporations. The most notable example may be the Racketeering Statute known as RICO, which stands for Racketeer Influenced Corrupt Organizations. While the title of the act makes it seem that the act prohibits certain practices of organized crime, RICO also targets corporations as well as any other group which is said to be an "enterprise" involved in certain listed crimes, including fraud. Under RICO, almost any crime that is at all organized qualifies. RICO's "enterprise liability" lumps corporations and other lawful entities together with traditional organized criminal gangs.[99]

B. CONGRESS LEAVES DEFINITION OF KEY TERMS IN CRIMES TO FEDERAL COURTS

Careful definition of crimes is tedious work. As with much of its legislation, Congress prefers to leave the difficult issues that arise in the course of drafting to the courts. While this may be acceptable in non-criminal matters, this practice in criminal statutes means that potential defendants do not always know what the law prohibits and that federal courts effectively exercise a power that the Constitution restricts to the Congress.

1. STRICT OR LIBERAL CONSTRUCTION OF CRIMINAL STATUTES?

All language has its ambiguities. As a result, courts will have to do a certain amount of interpretation. In matters of criminal law, Anglo-American tradition has specified the rule of "strict construction" to avoid unfairness to persons who cannot clearly understand that their conduct is prohibited. The interpretation of federal crimes has been complicated by the inclusion of references to the Commerce Clause, which has already been discussed, and also a) the failure of federal courts to adhere to the traditional rule of strict construction and b) the fact that federal crimes are a breed apart from most state crimes.

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a. CONSTRUCTION OF FEDERAL CRIMES

United States v. Kozminski[100] demonstrates both the manner in which federal courts should construe federal criminal statutes and also the willingness of the Justice Department to stretch the coverage of federal criminal statutes when the defendant has done something "bad" which nevertheless is not actually covered by the language of the statute. In *Kozminski* the Supreme Court interpreted the term "involuntary servitude" in a federal, criminal civil rights statute enacted after the Civil War making slavery a criminal offense. Congress certainly was authorized to enact this statute in order to implement the Thirteenth Amendment's prohibition of slavery. The Justice Department, however, had stretched the statute to apply to general psychological coercion. The defendants in the case had used tactics (denial of pay, substandard living conditions, and isolation) that were certainly wrongful, but not necessarily criminal under federal law, to convince two mentally-impaired adults to believe they had no alternative but to work on the defendants' farm. The defendants' acts would have been prosecutable under state law and possibly under other federal laws. Nevertheless, the Justice Department tried unsuccessfully to persuade the Supreme Court to give a very broad reading to the term "involuntary servitude." In rejecting that attempt, the Court illustrated what a dangerous interpretation the federal prosecutors were seeking by noting such an interpretation would make criminal all kinds of non-criminal conduct:

> [T]he Government conceded at oral argument that under its interpretation [the statute] could be used to punish **a parent who coerced an adult son or daughter into working in the family business by threatening withdrawal of affection** . . . . It has also been suggested that the Government's construction would cover a political leader who uses charisma to induce others to work without pay or a religious leader who obtains personal services by means of religious indoctrination.[101] (Emphasis added).

The Court rejected the Government's interpretation because it "would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes. It would also subject individuals to the risk of arbitrary or discriminatory prosecution and conviction."[102] While the Court reversed the case, that did not erase the fact the defendants had been prosecuted under a law that did not apply to them.

b. LIBERAL CONSTRUCTION

Although the term "involuntary servitude" construed in *Kozminski* is not a common law term, it has a history connected with the abolition of the effects of slavery which provides some common sense constraints on attempts to expand the statute. Many federal criminal statutes, however, notably those referred to as "white collar" or "organized crime" statutes, use terminology which lacks historical or common sense meanings. Such terminology requires greater precision in definition and narrow construction in order to ensure fair notice of what is prohibited. Unfortunately, that has not been the practice.

The sponsors of RICO recognized the impossibility of defining the term "organized crime" as well as the fact that any attempt to do so might impermissibly create a "status offense" (an offense for which no criminal act is required).[103] The Supreme Court has said that legislatures are barred by the Constitution from making it a crime to "be" a member of a group or organization.[104] RICO therefore did not use the term "organized crime"; rather, it defined "racketeering activity" and "enterprise,"[105] a term drawn from sociology.

In RICO, the potential for manipulation of language has been combined with an anti-corporate bias. At least some sociological terminology of RICO rests on theoretical conceptions drawn from leftist ideology. The creator of the critical term "enterprise" and the concept of "enterprise liability" in RICO has equated ordinary business executives with members of the Mafia.[106] While federal prosecutors and

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federal courts are oblivious to the origins of the concepts underpinning RICO, they have since about 1970 accepted the notion that pursuit of "white collar" and organized crime and corruption justifies liberal construction of criminal statutes.[107] RICO actually provides for liberal construction.[108] But even in statutes that do not provide liberal construction, federal courts have been more willing to loosely construe statutes, which target business practices. This willingness to construe liberally statutes aimed at "white collar" and organized crime seems related to the anti-corruption ethic described by Professor John Noonan.[109]

The potential for abuse is probably most serious when a RICO charge is based on mail fraud. The mail fraud statute itself is broadly defined and uncertain in application. Federal courts have construed it expansively.[110] Any act of fraud may constitute a federal offense if done in connection with the mails or telephone or telegraphy.[111] The term "fraud," moreover, is undefined in the federal statute and the jurisprudence basically disagrees as to what is required to establish criminal fraud.[112] With respect to fraud in a RICO charge, a court may liberally construe a federal statute of uncertain definition, and incorporate a state misdemeanor as the criminal act of fraud. An indictment for racketeering under RICO based on two acts of fraud communicated by mail or telephone may be far removed from organized crime activity; it also may lack the basic requirement of culpability due to uncertainty about the presence of a *mens rea*.

2. LIBERAL CONSTRUCTION VIOLATES SEPARATION OF POWERS

Liberal construction violates the constitutional principle of separation of powers. As long ago explained by Chief Justice Marshall, the Constitution's principle of separation of powers requires the rule of strict construction in all federal crimes.

> The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that *the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.*[113]

When courts liberally construe criminal statutes without such direction, they are assuming the legislative function without any basis for doing so. Admittedly, a distinction between construing and defining crimes may be difficult to draw. As applied to federal "racketeering" and public corruption statutes, however, federal courts have clearly crossed the uncertain line between "construction" and "definition," as Professor Noonan has discussed.

> For almost two centuries it had been black letter law that there was no federal common law of crimes - that is, federal judges lacked the power to turn evils into crimes the way English judges had done; every act which counted as a federal crime had to be an act proscribed by Congress. To a substantial degree, broad federal statutes and judicial self-confidence had made the black letter rule a myth . . . . The judges' freedom to interpret the criminal law gave them in fact the power, if they chose to exercise it, of making new law - of creating in effect a new federal common law of crime. With *[United States v.] Kenney* [462 F.2d 1205 (1972)] this judicial freedom was exercised in regard to bribery.[114]

C. MAKING NON-CRIMINAL ACTS INTO CRIMES RETROACTIVELY

However well intentioned, federal courts have violated long-standing limitations on their authority by expanding federal criminal statutes. Those limits stem from the early constitutional arguments against any federal common law of crimes; they expressed a distrust of the common law

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judicial power to create crimes in addition to the concern that federal criminal jurisdiction not encroach upon the states.[115] Then and ever since there has been a strong popular desire to constrain judges by preventing an expansive common-law process of interpretation.[116]

1. THE FEDERAL COURTS ALLOW RETROACTIVITY

The arguments about judicially-defined crimes have long raised the charge of *ex post facto* application of the law.[117] Although Congress has not completely delegated to federal courts the power of defining crime, to the extent that Congress leaves a statute loosely worded, especially if it calls for broad construction, it effectively commits to the courts much of their law-defining powers. At least crimes defined by reference to common law terms limit the Court's interpretive discretion due to the body of jurisprudence which has fairly well fixed the meaning of the terms.[118] Thus, the federal murder statute adopts the traditional common law formulation tied to "malice aforethought."[119] While the federal courts are able to exercise the common law function of further interpreting the crime prohibited, but not defined by Congress, that power -- if respected -- is restrained. By using words which have well-settled meanings according to the substantive principles of the common law, the body of common law discourse serves as a restriction in the process of interpretation.

Judicial definition of criminal legislation raises the same kind of objection addressed by the Constitution's *ex post facto* prohibition, namely that newly "defined" crimes cannot be applied retroactively.[120] The federal courts, however, have not viewed definition of statutes through judicial construction as a violation of the *ex post facto* clause of the Constitution.[121] Nevertheless, the Supreme Court has recognized that judicial definition of crime can violate due process if a new construction of a statute is in effect a retroactive application of a federal crime.[122] In some sense, this objection is applicable to the interpretation of almost every criminal statute.[123] The problem, however, is more pronounced in the interpretation of statutory offenses, both *malum prohibitum* crimes and mere regulatory offenses, which lack the fairly well-settled meaning of common law crimes.[124] Given the preponderance of such statutes among federal criminal laws and the looseness of federal construction, the retroactive application of crimes necessarily results. To recognize the validity of constitutional challenges based on retroactivity would and should place substantial restrictions on federal criminal law.[125]

Challenges to loosely worded federal statutes on the grounds that they create retroactive or *ex post facto* violations or that they are vague or over broad have not succeeded because courts seem confident in their ability to do justice by interpreting the statute. The objection is not that Congress' passage of the law is *ex post facto*, but that its delegation of the definitional power to the courts produces that effect. Whatever authority Congress has to delegate its powers,[126] the power to define crimes is different due to the problem of retroactive effect. A separation-of-powers analysis dictates that criminal statutes be distinguished from economic legislation. Nevertheless, the Court has been commingling interpretation of criminal statutes with other statutes enacted pursuant to the Commerce Clause.[127] Economic legislation, including regulatory offenses or provisions for administrative crimes, may also raise certain separation of powers problems between Congress and administrative agencies.[128] The separation of powers concerns here addressed are those between Congress and the Courts.

2. THE JUSTIFICATION: THE NEED TO ROOT OUT CORRUPTION

Behind the federalism and the separation of powers issues, one looks for reasons why the federal courts and prosecutors would press the federalization of crimes. Professor Noonan's summary of the developments under RICO and other federal crimes explains how federal prosecutors and courts have taken it upon themselves to decide what does and does not amount to public corruption. In discussing ABSCAM[129] and related "sting operations," he describes how public corruption cases have restructured political power:

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> Reciprocity remained central to politics. Federal prosecutors would decide which reciprocities were criminal. Federal judges would decide if the prosecutors' distinctions should be upheld. Definers of what exchanges constituted bribery, these prosecutors and judges were unlikely to forego their new power. Employing means that would have been criminal if employed by private persons, the executive branch was in a position to supervise every government official in the country from traffic court clerks to senators. The judicial branch was in a position to approve or disapprove this supervision. Enforcers of the antibribery ethic by the criminal law, these prosecutors and judges had become the guardians of honest government, local, state, and national, in America. At the center of this supervisory system created by the Hobbs Act, the Travel Act, the Internal Revenue Code, the mail and wire fraud statutes, the conspiracy statute, and *RICO, and "the federal common law" based on these acts*, was the crime of bribery. A new stage in the use of the concept of the bribe had been reached. This epoch, which began about 1968, caused unprecedented pressure for the creation of a clear line between what could lead to disgrace and prison and the voluntary contributions that were the fuel of politics in a democracy."[130]

The critical step in the prosecution of public corruption did not begin with Watergate, but rather, with efforts in the late 1960s started under the Nixon administration and continued under succeeding administrations.[131] President Nixon presented himself as a "believer in decentralization" but, "under his administration, a combination of old laws, prosecutorial ingenuity, judicial imperialism, and new legislation . . . began an effective federalization of the law of bribery."[132] An important step in this process was the expanded interpretation of the Hobbs Act[133] to include bribery as well as extortion.[134] In addition to the reinterpretation of this Act, federal prosecutors also relied on a variety of federal laws, including the Travel Act, criminal laws on tax evasion, the mail fraud and wire fraud acts, conspiracy law "and, above all," RICO.[135] With the aid of sympathetic interpretations of these statutes by federal judges, federal prosecutors established themselves as the protectors of public morality.

The argument that elected state officials cannot be trusted to prosecute local corruption certainly has some truth to it. It does not follow, however, that the situation requires the "independence" of federal prosecutors. According to the anti-corruption argument, if the federal prosecutors are not vigorous in their investigations of local officials, the people will be deprived of good government.[136] This argument for federal police powers assumes not only that federal law enforcement is better able to prosecute corruption, but also that criminal prosecution is preferable to other forms of attack on corruption, namely the democratic process.

The anti-corruption argument for the federalization of crime is similar to the argument made for the Independent Counsel Statute. It has been argued that the Executive Branch of the federal government cannot be trusted to prosecute the corruption of its own. Again, that may be true. In both the state and federal situations, however, the solutions are not only constitutionally questionable, but may be worse than the original problem. In both cases, the proper solution is to be found in the democratic process, a vigilant free press, and the structure of the Constitution's limitation on powers.

Conceding the existence of public corruption does not require acceptance of the proposition that the federal government has a direct role in protecting public morality, which is precisely what criminal law -- as opposed to the regulation of commerce -- does. The federalization of crime involves a shift of power from a multitude of locally elected officials, to an independent, centralized censor of public morality, staffed by career civil servants. While most of these federal civil servants are persons of integrity, dedication, and good intentions, it is naive to suppose that they are above politics, even if they are not involved in elected, partisan politics. To criticize the police power of federal officials does not mean to imply that state officials never abuse their own police powers. To hold both federal and state

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powers within their respective bounds is to reaffirm the federalism principle that freedom flourishes when power is diffused.

IV. THE CONCLUSION: WHERE TO PLACE YOUR TRUST?

The federalization of crime presents great danger because it is a centralized power, the abuse of which has nationwide -- indeed, worldwide[137] _ consequences. State officials can and have abused their own police powers, but those abuses are subject to constitutional and practical checks. While similar protections should operate against the abuses of federal law enforcement, they do not operate in practice because Congress and the courts are joined in the abuse of federal criminal law.

State law enforcement operates under a number of restraints on its powers: 1) state law enforcement, unlike the federal, has all it can do to discharge its front-line responsibilities to investigate and prosecute all crimes within its jurisdiction; 2) state prosecutors are generally elected and therefore politically accountable in ways that federally-appointed United States' attorneys are not; 3) individual state law enforcement agents and agencies are constrained by much more limited resources than federal law enforcement; 4) a state's power and therefore its potential abuses are confined within its own boundaries; 5) even within those borders, state police and prosecutorial practices are subject to more aggressive federal court review than are the practices of federal law enforcement, due to the greater availability and frequent use of federal civil rights actions.

The checks on federal law enforcement, on the other hand, are those of structural restraints on power through federalism and separation of powers. Within the Congress and between the Congress and the Executive branch, the normal institutional checks, which block or slow the passage of ill-conceived legislation, are not working as they should to prevent the federalization of criminal law. No member of Congress wants to be accused of favoring criminals. Thus, any legislation labeled "anti-criminal" stampedes the Congress, often at the initiation of the Executive branch, with little likelihood of being checked by the federal judiciary. This distortion of the Constitution's process enjoys popular support because the public naively assumes that it somehow has an effect in reducing crime. Instead of fighting crime, as this statement has tried to explain, much of federal criminal law places the innocent at risk and does so lawlessly under the Constitution.

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ENDNOTES

1. I gratefully acknowledge the research assistance of Jennifer N. Rath.

2. ABA TASK FORCE. REPORT ON THE FEDERAL IZATION OF CRIMINAL LAW 10 (J. Strazella, Reporter) (1998) [hereinafter ABA TASK FORCE REPORT].

3. *Id* at 7 (italics in the original).

4. *Id* at 8.

5. *Id* at 11.

6. *Id* at 10, note 11.

7. This author does not agree that statutes with civil penalties are crimes.

8. ABA TASK FORCE REPORT, *supra* note 2, at 10.

9. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 993 (1995) [hereinafter Beale, *Too Many/Too Few*]. Even with the expansion of federal jurisdiction, federal courts are still handling less than five percent of criminal prosecutions.

10. ABA TASK FORCE REPORT, *supra* note 2, at 13. ("Congress' decision to create a federal crime confers jurisdiction upon other federal entities and results in the involvement of others in different federal government branches . . .. Federal executive departments . . . assume broad supervisory responsibility and power over newly created crimes. This activates powerful federal investigatory agencies (such as the FBI, Treasury Department agencies, or Postal Inspectors) to investigate citizen activity for possible federal criminal violations. The scope of federal prosecutors' interest widens, resulting in power to act in a broader range of citizen conduct and intervene in more local conduct").

11. Gibbons V. Ogden, 22 U.S. 1 (1824), noting that Congress' power to regulate commerce "is complete in itself, . . . and acknowledges no limitations."

12. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) and U.S. v. Darby, 312 U.S. 100 (1941).

13. *See, e.g.*, Edwards v. California, 314 U.S. 160, 169 (1941). (Justice Douglas in a concurring opinion noted "[T]he right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines").

14. Although cases routinely refer to Congress' power over interstate commerce, the text of the Constitution provides Congress with the power to "regulate Commerce . . . among the several States." *See* Gibbons v. Ogden, 22 U.S. 1 (1824).

15. Gibbons v. Ogden, 22 U.S. 1 (1824).

16. *See* L. Hall, *The Substantive Law of Crimes* -- 1887-1936, 50 HARV. L. REV. 616, 622-31 (1937) (discussing anti-trust statutes, banking and security regulations).

17. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C. _ 301*et seq.* (1998)).

18. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1998)); *see generally* Letwin, *Congress and the Sherman Antitrust Law, 1887-1890*, 23 U. CHI. L. REV. 221 (1956); Limbaugh, *Historic Origins of Anti-Trust Legislation*, 18 MO. L. REV. 215 (1953).

19. Distinguishing between "true" crimes and other non-criminal or regulatory offenses is problematic. *See generally* J. Hall, *Prolegomena to a Science of Criminal Law*, 89 U. PA. L. REV. 549, 563-75 (1941). The *malum in se -- malum prohibitum* distinction (crimes by nature -- crimes by convention) has proven analytically ambiguous. *Id.* at 566. The distinction has also been made between "public welfare offenses" and "real crimes," Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933), for the purpose of designating a category of offenses which need not carry a *mens rea*. *See* Morissette v. United States, 342 U.S. 246 (1952). The distinction between regulatory offenses and "true" crimes reflects the distinction made by Professor Henry Hart in *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

20. *See In Re* Rapier, 143 U.S. 110, 134 (1892).

21. 188 U.S. 321 (1903).

22. *But see* Hammer v. Dagenhart, 247 U.S. 251 (1918), which was an exception to this trend. Later reversed by U.S. v. Darby, 312 U.S. 100 (1941), Hammer found a congressional law excluding from interstate commerce the products of child labor unconstitutional in that it exerted power over a purely local matter.

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23. *See* Baker, *Nationalizing Criminal Law: Does Organized Crime Make It Necessary and Proper?* 16 RUTGERS L.J. 495, 520-26.

24. *See* M. CONBOY, *Federal Criminal Law, reprinted* in 1 LAW: A CENTURY OF PROGRESS 1835-1935 318 (1937)

25. U.S. CONST. amend. XVIII, repealed by amend. XXI.

26. See Perez v. United States, 402 U.S. 146 (1971).

27. Stern, *The Commerce Clause Revisited -- The Federalism of Intrastate Crime*, 15 ARIZ. L.REV. 271, 276-285 (1973).

28. 301 U.S. 1 (1937).

29. 514 U.S. 549 (1995).

30. It did not declare federal criminal statutes unconstitutional, but instead tended to construe them narrowly in order to avoid constitutional problems.

31. 402 U.S. 146 (1971).

32. Stern, *The Commerce Clause Revisited -- The Federalism of Intrastate Crime*, 15 ARIZ. L. REV. 271, 284 (1973).

33. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. section 801 *et seq.*; 21 C.F.R. 1308.01 *et seq.*

34. *See* U.S. v. Tisor, 96 F3d 370 (1996).

35. While that is the ideal, federal court dockets are often bogged down with a disproportionate number of minor drug cases. In 1991, DC district judges complained that the U.S. Attorney was bringing minor drug cases (for example, cases involving $20 sales of crack cocaine or youthful first offenders arrested as couriers) in federal district court rather than superior court. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD POL. & SOC. SCI. 39, 47 (1996) [hereinafter Beale, *Federalizing Crime*].

There will of course be some legitimate overlap, as when a person smuggles drugs into the country. The federal government can certainly punish smuggling, a crime involving national borders. When detected, the smuggler will also have violated state law by possessing the drugs within that state.

36. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, FELONY SENTENCES IN THE U.S. 1994, Bulletin NCJ-1651-49, at 6-9 [hereinafter BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES]; Beale, *Too Many/Too Few*, *supra* note 41, at 998 (citations omitted):

> The sentences available in a federal prosecution are generally higher than those available in state court -- often ten or even twenty times higher. For example, in one drug case the recommended state sentence was eighteen months, while federal law required a mandatory minimum sentence of ten years, ... [A] defendant who received a diversionary state disposition to a thirty-day inpatient drug rehabilitation program, followed by expungement of his conviction upon successful completion of the program and follow-up, was subject to forty-six to fifty-seven months of imprisonment under the applicable federal guidelines.

37. *See, e.g.*, LSA-R.S. 40:966, a Louisiana statute requiring life sentence at hard labor, without benefit of probation or supervision, for conviction of distributing or intending to distribute Schedule I drugs. The comparable federal provision, 21 U.S.C. 841, can result in a minimum ten-year sentence followed by five years of supervised release and payment of a fine. For specifics on what the federal sentence could be, *see* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL section 2D1.11 and accompanying Sentencing Table (Nov. 1998).

38. Beale, *Too Many/Too Few*, *supra* note 9, at 984. The number of drug cases filed in federal court quadrupled between 1980-92. *See also* BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS (1995) at 11, 39 [hereinafter BUREAU OF JUSTICE STATISTICS, COMPENDIUM]. Drug suspects were more likely than any other offenders to be prosecuted in federal court, and the least likely to have their cases declined by federal prosecutors. Drug defendants comprised 42% of all felony defendants in U.S. district courts in 1995.

39. Beale, *Too Many/Too Few*, *supra* note 9, at 993 ("Even after the dramatic expansion of the federal criminal caseload in the 1980s and 1990s, the states are still handling more than ninety-five percent of all violent crime prosecutions").

40. *Id*, at 1000, 1001.

41. *See* S. Swartz & B. Burrough, *The SEC's Case Against Drexel*, WALL STREET JOURNAL, September 9, 1988 (page number unavailable online), noting that former Hutton chairman Robert Fomon has called Hutton's guilty plea the biggest mistake of his career.

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42. Gary Fields, *DEA Chief: Drug Fight Lacks Desire*, USA TODAY, Feb. 19, 1999 at 1A. ("The head of the Drug Enforcement Administration says the nation has neither the will nor the resources to win the drug war"), Gary Fields, *Drug policy Advisor: Time to "Get Serious,"* USA TODAY, March 19, 1999 at 3A. ("'[W]e haven't begun to get serious about the problem,' McCaffrey [national drug policy advisor] says")

43. *See* Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67 (1997).

44. Designated "Project Exile" and co-sponsored by the City of Richmond and the United States Attorney for the Eastern District of Virginia, the program allows arrests involving illegal guns made by Richmond police to be prosecuted in federal rather than state court. The stated goal is to reduce violent crime by federally prosecuting firearm-related crimes whenever possible. Under Project Exile, local police review each firearm-related offense to determine whether the conduct alleged also constitutes a federal crime.

45. Area/State, *Richmond's Homicide Rate Drops, Year Ends with 96 Deaths - The Fewest Since 1987*, RICHMOND TIMES-DISPATCH, January 2, 1999, at A1. ("After a decade of triple-digit body counts, Richmond's legendary homicide rate has dropped to its lowest level in more than a decade . . .. Many local officials point to Project Exile as a major factor in the turnaround"). *See also* News, *Truancy Trials*, USA TODAY, January 27, 1999, at 2A. ("[Project Exile] was credited by some with cutting the gun-related homicide rate by more than 30%")

46. BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 1996: CHANGES 1995-96 WITH TRENDS 1993-96 (1996) at 1 (as paginated in <http://www.ojp.gov/bjs/abstract/cv96.htm, visited Feb. 14, 1999) [hereinafter BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 1996]. Violent crime rates are the lowest recorded since 1973; violent crimes were 21% lower in 1997 than they had been in 1993. *See also* ABA ANNUAL REPORT: THE STATE OF CRIMINAL JUSTICE (1997) at iv-2 [hereinafter ABA ANNUAL REPORT]. Violent crime has decreased 12% between 1991 and 1996; reported serious crime, including violent crime, has been on a downward trend; in 1996, index crimes were at their lowest since 1986). The rate of decline has been uneven across the country. While it dropped nationally by four percent in 1997, in the Mountain West area it dropped by only about two and one-half percent. (Orrin Hatch and Bill McCollum, *Shortchanging Law Enforcement*, THE WASHINGTON TIMES, February 22, 1999 at A18).

47. ABA ANNUAL REPORT, *id*, at i-iii, notes two opposing trends: crime, drug use and victimization have decreased while the criminal justice system's response to crime has increased, and suggests that while they may be directly correlated, there are many possible reasons for the decrease in crime. Cited as possible factors are the changing role of police (most notably in the area of community policing), tougher measures to deal with serious offenders (including mandatory minimum sentences and habitual offender laws), and non-traditional approaches to less serious crime (such as specialized adjudication courts for drug, domestic violence and other family-related cases, and community-based bootcamp programs).

48. Area/State, *Bull's Eye or Wasted Shots?* RICHMOND TIMES-DISPATCH, January 22, 1999, notes the National Rifle Association donated $100,000 to the local foundation that purchases advertising to publicize the federal program.

49. *See* Editorial, RICHMOND TIMES-DISPATCH, Feb. 27, 1997, at A14. ("Local leaders – Commonwealth's Attorney David Hicks, Police Chief Jerry Oliver, and City Manager Robert Bobb -- . . . consider fighting crime more important than preserving turf").

50. *See* David S. Cloud, *Prosecutor's Strategy Scrambles Gun-Control Alliances*, THE WALL STREET JOURNAL, Aug. 31, 1998, at A20, noting that Congress wants to implement Project Exile in other cities.

51. *See* T. Stacy & K. Dayton, *The Under-Federalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247 (1997).

52. Beale, *Federalizing Crime, supra* note 35, at 45 (citation omitted).

53. *Id* at 50.

54. *Id* at 50.

55. Beale, *Too Many/Too Few, supra* note 9, at 981 ("This difficulty cannot be resolved by the addition of more federal judges because the expansion of the federal courts on the scale required would fundamentally alter their character and throw into question their ability to perform their constitutional role"); J. Harvie Wilkinson III, *We Don't Need More Federal Judges*, WALL ST. J., February 9, 1998, at A19.

56. Tom Campbell, *Bull's Eye or Wasted Shots? Federal Judges Not Among Gun Program's Supporters*, RICHMOND TIMES-DISPATCH, January 22, 1999, at A1, quoting letter from Senior U.S. District Judge Richard L. Williams to Chief Justice William H. Rehnquist [hereinafter *Letter to the Chief Justice*].

57. Beale, *Too Many/Too Few, supra* note 9, at 993 ("Doubling, tripling, or even quadrupling the federal judiciary would still leave the vast bulk of criminal cases in the state courts. Enlarging the federal courts sufficiently to take on the bulk of these cases would indeed change their character beyond recognition and be incompatible with their other constitutional

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functions").

58. *Letter to the Chief Justice*, *supra* note 56 at A1. ("Not only does [prosecuting armed street-level criminals in federal court] do violence to concepts of federalism, the cost to national taxpayers is at least three times more than if the [state] handled these cases"). ***See also*** U.S. v. Jones, 1999 WL 42038 (E.D. Va.). (Trying street crimes in federal rather than state court "force[s] federal taxpayers to support local law enforcement . . . at a significantly greater expense than would a comparable state prosecution. The rates [for court-appointed counsel are] more than ten times the amount the Commonwealth provides").

59. Regarding increasing expenditures, *see* ABA TASK FORCE REPORT, *supra* note 2, at 14. Overall federal justice system expenditures have increased dramatically. Between 1982 and 1993, federal expenditures increased at twice the rate of comparable state and local expenditures, increasing 317% as compared to 163%. The number of federal justice system personnel increased by 96% from 1982 to 1993

60. U.S. CONST. art. I, section 8, cl. 1

61. *See* Baker, *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?* 16 RUTGERS LAW JOURNAL 495, 504-13 (1985).

62. 514 U.S. 549, 566 (1995).

63. *See* Hal Burbach, Violence and the Public Schools at 3, <http://curry.edschool.virginia.edu/~rkb3b/Hal/School Violence.html (visited Feb. 14, 1999). Discusses surveyed judges who ranked "Family Breakdown" higher than "Drugs," "No Jobs," "Poor Housing," "Poor Education", or "Don't Know" as a reason for juvenile crime. *See also* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, FACT SHEET #8: FAMILY STRENGTHENING FOR HIGH-RISK YOUTH (March 1994) at 1 (as paginated in <http://www.ncjrs.org/txtfiles/fs-9408.txt, visited February 14, 1999); *id*, FACT SHEET #21: VIOLENT FAMILIES AND YOUTH VIOLENCE (December 1994) at 2 (as paginated in <http://www.ncjrs.org/txtfiles/fs-9421.txt, visited February14, 1999).

64. ABA ANNUAL REPORT, *supra* note 46, at 12. Reports that increasing numbers of police are being deployed in community policing programs. By 1993, 40% of the nation's larger police departments had established community-policing programs. The Violent Crime Control and Law Enforcement Act of 1994 authorized funding up to $8.8 billion to assist states and localities in hiring officers for community-based policing. By 1997, 57,000 new officers had been hired and an additional 17,000 were included in the 1998 budget request.

65. FEDERAL BUREAU OF INVESTIGATION (R. TROJANOWICZ ET AL), COMMUNITY POLICING: A SURVEY OF POLICE DEPARTMENTS IN THE UNITED STATES (1994) at 2-3 (as paginated in <http://www.concentric.net/~dwoods/study.htm, visited February 13, 1999). Community policing is believed to have decreased the incidence of such "neighborhood" or local crimes as street-level drug dealing and general "social disorder." Forty-eight percent of police chiefs reported "serious" crime had decreased in their precincts since implementing community-policing programs. Fifty-nine percent reported that "less serious" crime had decreased; between 77-82% reported street level drug dealing, "social disorder" and "physical disorder" had decreased as well.

66. *Id* at 2. Of the police chiefs who implemented community-policing programs, 74% reported using "park and walk" programs and 14% used foot patrols, as distinct from "park and walks."

67. *Id* at 2. Of the police chiefs who implemented community policing programs, 77% had assigned community officers to defined beats and 65% had decentralized offices in beat areas.

68. *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 508, 631 (2d ed. 1992 [hereinafter LAFAVE & ISRAEL, CRIMINAL PROCEDURE].

69. N. Morton, *Symbolic Policies in Clinton's Crime Control Agenda*, 1BUFF. CRIM. L.REV. 67 (1997); *Cities with High Crime, Poverty get Federal Money for More Police*, THE BOSTON GLOBE, May 30, 1998, at A7. *See also* Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. sections 921(a), 922.

70. U.S. CONST art. III, section 2; Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (A jury of peers is "an inestimable safeguard against the corrupt or overzealous prosecutor...").

71. *See* BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, *supra* note 46, at 1, reporting that only 40% of violent crimes and 30% of property crimes were reported to police in 1996.

72. ABA ANNUAL REPORT, *supra* note 46 at 10; LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 20. ("[F]or those crimes on which the F.B.I collects data, there is approximately one arrest for every five offenses reported to the police").

73. LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 21.

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74. BUREAU OF JUSTICE STATISTICS, COMPENDIUM, *supra* note 38, at 7, Figure S 2. Shows that of all federal criminal defendants prosecuted in 1995, forty-six percent were convicted. *See also* LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 27. About two-thirds of state criminal defendants arrested for felonies are convicted.

75. BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES, *supra* note 36, at 2; Beale, *Too Many Too Few*, *supra* note 9.

76. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 1, 2. Of all prisoners released from prisons in 1983, 62.5% were rearrested for a felony or serious misdemeanor within three years, of prisoners age 18 to 24 with 11 or more prior arrests, 94.1% were rearrested within three years, prior to their release from prison, that year's cohort had been arrested and charged with an average of more than 12 offenses each. *See also* MARVIN WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT (1972), finding that 6% of a cohort of boys born in Philadelphia in 1945 accounted for over 50% of offenses. *But see* William Raspberry, *Crime and the 6 Percent Solution*, THE WASHINGTON POST, March 14, 1994 at A19, noting that the six percent figure is often misinterpreted to mean that six percent of criminals (not six percent of the total population) commit over half of all crimes.

77. 1 CRIMINAL CAREERS AND "CAREER CRIMINALS" (Alfred Blumstein et al, eds., 1996).

78. LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 21.

79. *See* BUREAU OF JUSTICE STATISTICS, COMPENDIUM, *supra* note 38, at 17, Table 1 3; LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 623, 624.

80. LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 21.

81. The minimum evidentiary requirement to bring a prosecution in good faith is probable cause that the defendant has committed a crime. The broader the criminal statute, the easier it is to establish probable cause. Even if broad criminal statutes ease the burden of proof, they impose another undue burden on the prosecutor. The prosecutor need not and should not decline to prosecute simply because he may not be convinced prior to trial of the defendant's guilt beyond a reasonable doubt. He knows that there may be certain things not known to him, but possibly to the defendant, which may or may not come out at trial. While exercising ethical restraint, the prosecutor's professional responsibility does not include building the defendant's case.

82. BUREAU OF JUSTICE STATISTICS, COMPENDIUM, *supra* note 38, at 39 ("92% of those convicted [federal criminal defendants in 1995] pleaded guilty, while only 8% were convicted at trial"); LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 26, noting that guilty pleas account for 75-90% of dispositions.

83. In some jurisdictions, the prosecution may not in practice be able to do adequate screening for various reasons. In a jurisdiction that requires the prosecutor to accept or reject charges in a relatively short period of time, e.g., 48 hours, the prosecutor will have insufficient time to give adequate review to the charges. Under those circumstances, prudence dictates that the prosecutor accept all cases that might well be triable. All things being the same, the plea bargain rate would likely be higher in such a jurisdiction.

84. *But see* Kurt A. Schlichter, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 LOYOLA OF LOS ANGELES L.R. 1291 (1993).

85. U.S. CONST. art.IV, section 4. *See* Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 75-76 (1997) [hereinafter Bybee, *Insuring Domestic Tranquility*].

86. Beale, *Too Many/Too Few*, *supra* note 9, at 997 ("Dual federal-state criminal jurisdiction is now the rule rather than the exception. Federal law reaches at least some instances of each of the following state offenses: theft, fraud, extortion, bribery, assault, domestic violence, robbery, murder, weapons offenses, and drug offenses. In many instances, federal law overlaps almost completely with state law...") (citations omitted).

87. *See* Printz v. U.S., 521 U.S. 98 (1997).

88. *See* Bybee, *Insuring Domestic Tranquility*, *supra* note 85, at 49-52.

89. U.S. CONST. art. IV, section 2, cl. 2.

90. California v. Superior Court of California, 482 U.S. 400, 406 (1987). ("The Extradition Clause, however, does not specifically establish a procedure by which interstate extradition is to take place, and, accordingly, has never been considered to be self-executing"). In 1793, Congress enacted the Extradition Act (Act of Feb. 12, 1793, ch. 7, section 1, 1 Stat. 302) to regulate the process.

91. *See* New York v. U.S., 505 U.S. 144 (1992).

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92. *See* Printz v. U.S., 521 U.S. 98 (1997).

93. 18 U.S.C. section 1073.

94. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

95. 188 U.S. 321 (1903).

96. 514 U.S. 549 (1995).

97. *See supra* note 19 and accompanying text.

98. 29 U.S.C. section 216 (1996).

99. U.S. v. Turkette, 452 U.S. 576 (1981).

100. 487 U.S. 931 (1988).

101. *Id* at 949.

102. *Id* at 949.

103. BLACK'S LAW DICTIONARY 446 (4th ed. 1968) (Statutory crimes are those created by statute, as distinguished from those such as are known to the common law).

104. Robinson v. California, 370 U.S. 660 (1962).

105. 18 U.S.C. §1961 (1982).

106. According to the sociologist who invented the term "enterprise liability" used in RICO, the only apparent distinction between "organized criminals" and business people are that the former are economically and psychologically underdeveloped persons in the process of evolving into white-collar criminals. *See* E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 270-71 (10th ed. 1978).

107. The Court has held that strict construction is inapplicable when congressional intent, as evinced by legislative history, is that the statute be construed liberally. United States v. Turkette, 452 U.S. 576, 588-93 (1981). It has been argued that the rule of liberal construction comports with the trend of the states. The argument equates liberal construction with the construction of words according to their "fair import." In fact, liberal construction and construction according to "fair import" derive from opposing attitudes about the proper role of the judiciary. Where liberal construction endorses judicial lawmaking, "fair import" construction is rooted in a reaction to the common law powers of judges. Moreover, the fact that some states may adopt liberal standards of construction does not necessarily justify a liberal standard for federal legislation. States have primarily been concerned with the common law offenses or what are considered "ordinary" crimes. Even though states have generally departed from the common law of crimes in favor of codification and have modified the elements of particular crimes, the codification of crimes follows in large part the content of the common law of crimes. Such crimes present few constitutional problems in terms of notice because the core meanings of crimes such as murder, rape, and robbery are well understood. On the other hand, newly created crimes, whether state or federal, which proscribe conduct in language that is unclear, are more likely to present notice problems.

108. Pub.L. 91-452, Title IX, section 904(a), Oct. 15, 1970, 84 Stat. 941 provides that "The provisions of this title [RICO] shall be liberally construed to effectuate its remedial purposes."

109. *See generally* J. NOONAN, BRIBES (1984).

110. *See* John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981) [hereinafter Coffee, *From Tort to Crime*] and the cases cited therein.

111. 18 U.S.C. §§ 1341, 1343 (1994).

112. Coffee, *From Tort to Crime*, *supra* note 110 at 126-27. ("[C]ourts have refused to define 'scheme to defraud' in terms of any objectively verifiable set of facts or circumstances. Indeed, judicial definition of the term has been almost exclusively negative").

113. United States v. Wiltberger, 18 U.S. 76 (1820) (emphasis added). The Court relied on *Wiltberger* in narrowly construing the National Stolen Property Act, 18 U.S.C. 2314 (1994), as applied to a copyright violation. *See* Dowling v. United States, 473 U.S. 207, 213-14 (1985).

114. J. NOONAN, BRIBES 585-86 (1984).

115. On the Federalist-Republican conflict over the proper role of the judiciary in the new republic, *see generally* R.

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ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971).

116. *See* C. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 86, 91-92, 160-61 (1981).

117. "This mode of proceeding manifestly partakes of the odious nature of an ex post facto law." 2 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 365-66 (1796), *quoted in* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 14 (1977).

118. 1 W. STORY, LIFE AND LETTERS OF JOSEPH STORY 298 (1851):

Crimes are so various in their nature and character, and so infinitely diversified in their circumstances, that it is almost impossible to enumerate and define them with requisite certainty. An ingenious rogue will almost always escape from the text of the statute book. But how much more certain is the common law. Its flexibility in adapting itself to all the circumstances of the various cases is wonderful.

119. 18 U.S.C. § 1111 (1994).

120. SWIFT, as quoted in HOROWITZ, *supra* note 117 at 365-66. By construction, a court could render criminal an act which, under prior constructions, was not prohibited.

121. Frank v. Mangam, 237 U.S. 309, 344 (1915) (*ex post facto* clause of Constitution applies only to statutes).

122. Marks v. U.S., 430 U.S. 188, 191-92 (1977) (retroactive application of standards announced in case decided subsequent to defendant's actions violates due process).

123. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 61 (2d ed 1960).

124. *Supra*, note 19.

125. *See* J. NOONAN, BRIBES 586 (1984).

126. *See* Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

127. *See* Perez v. United States, 402 U.S. 146 (1971) and the cases cited therein.

128. *See* Abrahams & Snowden, *Separation of Powers and Administrative Crimes: A Study of Irreconcilables*, 1976 S. ILL. U.L.J. 1, 34-38, 43, 45-46, 102-05, 117-20.

129. J. NOONAN, BRIBES 604-20 (1984).

130. *Id.* at 620 (emphasis added).

131. *Id.* at 584.

132. *Id.*

133. 18 U.S.C. §1951 (1994).

134. *See* U.S. v. Kenny, 462 F.2d 1205 (1972), *cert. denied* 409 U.S. 914 (1972), *discussed in* J. NOONAN, BRIBES 584-89 (1984).

135. J. NOONAN, BRIBES 587 (1984).

136. The Court in McNally v. U.S., 483 U.S. 350, 360 (1987) declined to extend the scope of the mail fraud statute from protection of property rights to protection of a citizen's intangible right to honest and impartial government: "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [section] 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." McNally v. U.S. was legislatively overruled in November, 1988, when Congress amended the statute to make intangible rights actionable.

137. *See* Linda Duetsch, *Man Pleads Guilty to Money Laundering*, ASSOCIATED PRESS ONLINE, March 9, 1999. U.S. Customs agents arrested top Mexican bankers and executives in a money-laundering sting, raising tensions between the U.S. and Mexico. Mexico accused the United States of intruding on Mexican sovereignty. *See also Chinese National, Companies Indicted on Arms Export Control Violation*, ASSOCIATED PRESS NEWSWIRES, March 9, 1999. A U.S. federal grand jury indicted a Chinese immigrant to Canada, a Chinese national, and two foreign companies for gun running and money laundering.

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

STATEMENT OF JOHN T. SPOTILA
ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
before the
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
July 14, 1999

Good afternoon, Mr. Chairman and members of the Committee. Thank you for inviting me to appear before you today.

At the outset, on behalf of the President, I want to emphasize our commitment to the principles of federalism and our respect for the Tenth Amendment to the Constitution. Mr. Chairman, as you rightly have pointed out, "the national government has limited powers" and, generally, "government closest to the people works best." President Clinton has actively encouraged intergovernmental consultation in his issuance of Executive Orders 12866 and 12875 and his support for and signing of the Unfunded Mandates Reform Act.

You have asked me to discuss S. 1214, the "Federalism Accountability Act of 1999." This bill seeks to promote the integrity and effectiveness of our Federal system of government. It would do so in four ways –

- having committee and conference reports contain an explicit statement on the extent to which the bill preempts State or local law;

- stating rules of construction regarding the preemption of State and local government authority by Federal laws and regulations;

- calling for extensive consultation with State, local, and tribal officials and their representatives, and the preparation by agencies of federalism assessments for their rules; and

- establishing an information collection system to monitor Federal statutory, regulatory, and judicial preemption.

S. 1214 clearly represents a serious effort to guide relations between the Federal government and state and local governments. We respect and support that effort. S. 1214 also avoids a number of problems present in its House counterpart, H.R. 2245. We are pleased at that. We do have concerns, however, that in its current form S. 1214 could have unintended consequences. These may include burdening agency efforts to protect safety, health, and the environment by imposing new administrative requirements on their activities and by encouraging additional litigation. The Administration believes that these aspects depart from the approach adopted in the Unfunded Mandates Reform Act, which it supported and is implementing. We believe that S. 1214 needs some revision if it is to accomplish its goal effectively. We would welcome the opportunity to work with you and your staff in this regard.

The Department of Justice will be discussing the Administration's concerns with Section 6, "Rules of Construction Relating to Preemption." My testimony will focus on the Administration's views on Section 7, "Agency Federalism Assessments." We do see a need for clarification and have some other drafting comments that we would like to share with you and your staff at a later point. They are not part of my testimony today.

Our primary concerns with Section 7 revolve around the interaction between its creation of a series of new rulemaking requirements and the potential for harmful litigation arising from them.

Section 7 would require each rulemaking agency to designate a special federalism officer to serve as a liaison to State and local officials and their designated representatives. Section 7(b)

would require each rulemaking agency, early in the process of developing a rule, to "consult with, and provide an opportunity for meaningful participation" by public officials of potentially affected governments. These are defined to include State, local, and tribal elected officials and their representative organizations. Section 7(c) would require rulemaking agencies, when publishing any proposed, interim final, or final rule which the federalism official identified as having a federalism impact, to publish in the Federal Register a formal federalism assessment. Each of these federalism assessments would involve four mandatory components: identifying "the extent to which the rule preempts State or local government law," analyzing the extent to which the rule regulates "in an area of traditional State authority" and the degree "to which State or local authority will be maintained," describing the measures the agency took "to minimize the impact on State and local governments," and describing the extent and nature of the agency's prior consultations with public officials and "the extent to which those concerns have been met."

These new requirements may not be unreasonable in themselves. As now written, however,
S. 1214 raises the risk that agencies could face litigation on each subcomponent of these requirements. The resultant need to document formally each and every aspect of an agency's compliance with them could involve a significant new administrative burden. This is particularly true for agencies who are trying to implement laws and protect public health, safety, and the environment with limited resources. Even if the agency has acted in good faith, litigation can cause delays and drain scarce resources. To avoid such excessive litigation, the Administration feels that S. 1214 should include a statutory bar to judicial review of agency compliance with its provisions.

There are practical implications in this regard. The intergovernmental consultation process described in Section 7 must take place before the rulemaking is first published in the Federal Register. We agree that such a process can be beneficial. Currently, as encouraged by E.O. 12875 and the Unfunded Mandates Reform Act, agencies reach out to State, local, and tribal governments and their representatives on a regular basis to hear their concerns and discuss

important rulemakings. These discussions typically proceed in a spirit of intergovernmental partnership, often informally, after reasonable efforts to reach those most likely to be interested. Thus, as a general matter, we believe agencies already carry out consultations as envisioned in Section 7 and do so in a meaningful way.

Our concern here revolves around increasing the potential for litigation. If we make these collegial, informal discussions subject to the possibility of judicial review, it would change the whole dynamic. Rather than discussing matters openly in a spirit of partnership, some agencies could resort to check-lists – building up a record that proves that each step has been carried out. There would be internal agency monitoring to ensure that the check-lists are complete and an emphasis on objective documentation that could be used in court. Instead of working to improve their rules, agencies might shift their focus to improving their litigation position.

This will divert scarce resources. Agencies would feel compelled to prove that each step has been carried out fully, even if the particular rulemaking does not have the scope and importance to warrant such extensive administrative effort. Instead of tailoring their informal prepublication discussions as the circumstances of the rulemaking warrant, agencies would feel a need to create a prerulemaking record as formal and objectively documented as their counsel deems necessary to withstand a court challenge. It is not at all clear that this will lead to better rules, despite the good intentions embodied in Section 7.

How might this play out? Here is an example. Section 7 directs each agency to "provide an opportunity for meaningful participation by public officials of governments that may potentially be affected." We agree that agencies should do so. But allowing judicial review of agency compliance with this provision would permit potential litigants to ask a Federal judge to decide a wide variety of new issues. How much notice is legally adequate to "provide an opportunity?" How much outreach effort does an agency have to make to seek "meaningful participation?" If an agency conducts extensive consultations with some of the Big 7, can others

of the Big 7 litigate their failing to be included? What about individual State or local governments that do not agree with positions taken by the Big 7? Do they each need to be invited to participate? What kind of objectively documented finding does a "federalism official" have to make to determine that a rulemaking does not have "a federalism impact,"and thus does not require a "federalism assessment?" The agencies would have to consider, plan for, and determine how to resolve questions like these. This would take time. It also might keep them from even more important tasks, like paperwork reduction initiatives, the review and revision of outdated and burdensome existing rules, and the conversion of rules into plain language.

For that matter, each agency would have to do more than just ensure that all of those who were supposed to be notified and consulted were satisfied with the agency's compliance with Section 7. Others with an interest in the rulemaking itself – including various special interests – could potentially challenge the rulemaking because they were not satisfied with that compliance. They might even do so just to hamstring the agency and slow down its regulatory efforts. Agencies would thus have an even broader group to consider when designing a consultation effort.

We all know what road is paved with good intentions. While we respect the careful thought and sincere concern underlying S. 1214, we believe that it requires some changes to avoid unintended, adverse consequences. We would be pleased o work with you and your staff on these issues.

Thank you for the opportunity to appear before you today. I would be happy to answer any questions you may have.

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STATEMENT OF RANDOLPH D. MOSS
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE
before the
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
July 14, 1999

Mr. Chairman, members of the Committee, I am honored to be here today to testify regarding S. 1214, the Federalism Accountability Act of 1999. Mr. Spotila, representing the Office of Information and Regulatory Affairs of the Office of Management and Budget, has discussed the Administration's concerns with section 7 of the bill, which would require Federal agencies to prepare and publish federalism assessments for certain Federal rules. My remarks will focus on section 6, which would establish rules of construction relating to statutory and regulatory preemption.

Section 6 would establish new rules of construction relating to Federal preemption of State law. Sections 6(a) and 6(b) would alter the rules under which courts currently determine whether Congress has preempted State law by statute or authorized preemption of State law by regulation. Section 6(c) would operate more broadly, requiring that any ambiguity in the Federalism Accountability Act or in any other Federal law be construed in favor of preserving the authority of the States and the people. Although we are still evaluating the potential implications of these provisions, we believe that each raises questions that warrant careful consideration.

Under current Supreme Court doctrine, the preemptive force of a Federal statute is

determined by examining Congress's intentions with respect to preemption.[1] Congressional intent to preempt can be stated explicitly, in the terms of a statutory provision addressing preemption. This is commonly referred to as "express preemption." In addition, congressional intent can also be conveyed implicitly, through the establishment of Federal law that conflicts with State law, commonly known as "conflict preemption," or that occupies an entire field and leaves no room for State lawmaking, commonly known as "field preemption." Conflict preemption occurs where Federal law and State law are in direct conflict or where State law stands as an obstacle to the achievement of Federal objectives. Field preemption occurs where the creation of a pervasive system of Federal regulation makes it reasonable to infer that Congress intended to disallow supplemental State law measures or where Congress legislates in an area where the Federal interest is so dominant that a Federal system can be presumed to displace State laws on the same subject. The doctrine of field preemption has formed the basis for Federal preemption of State law in a number of important areas, including nuclear safety, collective bargaining, and alien registration.[2]

Section 6(a) would change the rules under which courts and agencies infer congressional intent to preempt by statute. Under section 6(a), no Federal statute enacted after the effective

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[1] For a general summary of Supreme Court doctrine concerning the preemption of State law by Federal statutes, see English v. General Elec. Co., 496 U.S. 72, 79 (1990). Accord Boggs v. Boggs, 520 U.S. 833, 839-41 (1997).

[2] See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 212-13 (1983) (nuclear safety); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 750-51 (1985) (collective bargaining); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (registration of aliens).

date of the Federalism Accountability Act would preempt State law unless the statute contained an express statement of Congress's intent to preempt or there was a "direct conflict" between the Federal statute and State law so that the two could not "be reconciled or consistently stand together." This provision would profoundly alter the Federal courts' longstanding approach to preemption by Federal statute. It would apparently abolish the doctrine of field preemption and impose significant new limits on conflict preemption.[3]

The findings section of the Act notes that this change is made necessary by Federal court preemption rulings that have applied current doctrine to produce results "contrary to or beyond the intent of Congress." S. 1214, § 2(5). It is not clear, however, which applications of existing preemption doctrine are viewed as having misinterpreted the intent of Congress. Our review indicates that Federal court decisions involving field preemption and obstacle conflict preemption generally have demonstrated a strong commitment to the avoidance of preemption that is not necessary to the achievement of clear statutory objectives. The Supreme Court has determined, for example, that Federal law occupies the field of nuclear safety regulation, but does not preempt State regulation of nuclear utilities that does not bear directly on safety; and that the National Labor Relation Act occupies the field of collective bargaining, but not the field

[3] The Supreme Court has stated that conflict preemption and field preemption should not be viewed as "rigidly distinct" categories and has suggested that "field preemption may be understood as a species of conflict preemption," since State law operating within a preempted field can be seen to conflict with Congress's intent to exclude State regulation. English v. General Elec., 496 U.S. at 79 n.5. Section 6(a) of S. 1214, by confining implied preemption to situations involving "a direct conflict" between irreconcilable or inconsistent directives, would appear to foreclose recognition of field preemption as a subclass of conflict preemption for purposes of section 6 of the bill.

of labor relations in general.[4]

In addition, under both conflict and field preemption doctrines, the burden that must be borne by the proponent of preemption varies with the setting. In areas of traditional State primacy, the courts require a heightened showing of congressional intent to preempt. Indeed, the Supreme Court has stated that "[w]hen Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[5]

More importantly, it seems far from clear that increased reliance on express preemption provisions in Federal statutes will produce better results. It can be extremely difficult to craft express preemption provisions that produce the desired balance between Federal and State authority. Detailed express preemption provisions may be prone to overinclusiveness, displacing

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[4] See Pacific Gas & Elec., 461 U.S. at 212-13 (limited preemption respecting nuclear safety); Metropolitan Life, 471 U.S. at 750-51 (limited preemption respecting collective bargaining).

[5] California v. ARC America Corp., 490 U.S. 93, 101 (1989) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Conversely, in fields that implicate certain special and well-established Federal interests, such as the protection of Indian self-government, the test for determining whether State authority has been displaced is less exacting. See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (Federal preemption of State law governing Indians' dealings with non-Indians coming from outside the reservation must "proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government . . ."); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) ("The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.").

State law where such displacement is not truly necessary, or underinclusiveness, undermining the effectiveness of Federal law by failing to displace antithetical State law. Moreover, the problems with such express preemption provisions are likely to be most acute where the stakes are highest -- that is, where Congress enacts legislation that applies broadly and over a long period of time. Indeed, some of the harshest criticism of Federal preemption has focused on perceived excesses of preemption under express statutory provisions contained in such legislation. One noteworthy example is section 514(a) of the the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a) (1994). That provision, which expressly preempts most State laws that "relate to" employee benefit plans covered by ERISA, has been criticized for cutting too wide a swath through State law governing employee benefit plans.[6]

It is also important to note that enactment of S. 1214 would not prevent a later Congress from instructing that the preemptive effects of a particular statute should be determined, notwithstanding section 6(a), by reference to traditional implied preemption doctrines. Indeed, one significant set of interpretive problems that would likely arise in the implementation of this

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[6] See, e.g., Jeffrey E. Shuren, Legal Accountability For Utilization Review in ERISA Health Plans, 77 N.C. L. Rev. 731, 772 (1999) ("ERISA's preemption provisions combined with the limited remedies available under ERISA for breach of fiduciary duty have shielded [entities that perform utilization review] as well as third-party payers, from the consequences of [utilization review] decisions."); Jack K. Kilcullen, Groping for the Reins: ERISA, HMO Malpractice and Enterprise Liability, 22 Am. J.L. & Med. 7, 9-10 (1996) (preemption under ERISA "interferes with judicial efforts to establish corporate liability" and prevents States from undertaking needed efforts to "reformulat[e] traditional concepts of medical malpractice to reach HMOs"); see also Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 63 (D. Mass. 1997) ("Under any criterion . . . the shield of near absolute immunity now provided by ERISA simply cannot be justified.").

provision -- and of the other rules of construction found in section 6 -- would involve disputes as to whether Congress implicitly intended to exempt particular statutes from section 6 of the Federalism Accountability Act. For example, if a subsequent Congress enacted a law that established a pervasive Federal regulatory regime and that demonstrated a clear, though not express, intention to preempt, courts might well conclude that the later enactment implicitly repealed section 6(a)'s limitations on field and conflict preemption. Such difficult interpretive issues would introduce a form of confusion not present under current Supreme Court preemption doctrine.

Section 6(b)'s proposed changes to current regulatory preemption doctrine raise concerns similar to those raised by section 6(a)'s proposed changes to current statutory preemption doctrine. The Supreme Court has stated that "in proper circumstances, [a Federal] agency may determine that its authority is exclusive and pre-empt[ ] any state efforts to regulate in the forbidden area," City of New York v. FCC, 486 U.S. 57, 64 (1988). In describing these "proper circumstances," the Court has rejected the notion that the rulemaking agency must demonstrate that Congress specifically considered the question of regulatory preemption and decided to confer this authority on the rulemaking agency. Justice White, writing for a unanimous Court in City of New York, described the test of agency authority to preempt by regulation in the following terms:

> It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies.

> Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." United States v. Shimer, 367 U.S. 374, 383 (1961).

City of New York, 486 U.S. at 64.

Section 6(b) would apparently alter the Supreme Court standard for determining whether rulemaking agencies possess the authority to issue preemptive regulations. Under this provision, a Federal rule issued after the effective date of the Federalism Accountability Act could not preempt State law unless (1) regulatory preemption was "authorized by the statute under which the rule is promulgated" and the regulation was accompanied by a statement in the Federal Register explicitly stating that such preemption was intended, or (2) the regulation directly conflicted with State law.

It is difficult to predict how courts might interpret the reference to statutory authorization in section 6(b)(1). Opponents of new regulations would likely argue that section 6(b)(1) is quite limited -- that statutory authorization to issue preemptive regulations, in this context, can only mean specific and express authorization to issue such rules. Moreover, opponents of new regulations would also be likely to argue that this restrictive reading of section 6(b)(1) must prevail so long as it is merely plausible, since ambiguities in the Act, would have to be resolved in favor of the States and the people by virtue of section 6(c).

These questions concerning the requirements for issuing preemptive regulations under section 6(b)(1) would, at a minimum, engender significant confusion and could produce a substantial volume of litigation. Uncertainty and the threat of litigation could be especially serious for agencies that are called upon to update and revise complex regulations under longstanding statutes that lack specific and express authorizations to issue preemptive rules. The Occupational Safety and Health Administration (OSHA), for example, could confront arguments that the Occupational Safety and Health Act, although construed in the past to authorize the issuance of preemptive regulations, lacks the required statutory statement and that new OSHA rules, therefore, can only preempt State law where the new OSHA requirement directly conflicts with State law.[7]

Under section 6(c), any ambiguity in S. 1214, or "in any other law of the United States" -- predating or postdating the Federalism Accountability Act -- would "be construed in favor of preserving the authority of the States and the people." The potential implications of an instruction of this sweeping scope are difficult to assess, although the potential for far reaching and unanticipated consequences is pervasive. It is unclear how this provision might affect the

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[7] In Gade v. National Solid Waste Management Ass'n, 505 U.S. 88 (1992), eight members of the Court agreed that no statutory provision expressly invests OSHA regulations with the power to preempt "nonconflicting state laws," id. at 103 (that is, supplemental State-law requirements applicable to federally regulated practices). See id. at 96-104 (plur. op. of O'Connor, J.); see id. at 117-18 (dissenting op. of Souter, J.). Nevertheless, a plurality of the Court concluded that OSHA regulations preempt such nonconflicting State laws, basing preemption on the conflict between such State laws and Congress's clear intention to ensure that employees and employers are subject to "only one set of regulations." Id. at 99. (Justice Kennedy concurred in the judgment under an express preemption rationale. See id. at 109.)

reach of Federal statutes and regulations. How would section 6(c) apply to statutory and regulatory language that, although ambiguous on its face, has been clarified by case law or administrative interpretation predating the enactment of section 9(c)? Would section 6(c) require adoption of the narrowest plausible reading of virtually every statutory or regulatory assertion of Federal power on grounds that such a reading operates to preserve the greatest authority for the States and the people? Special difficulties would arise in the interpretation of Federal laws that limit State authority in ways that arguably enhance the authority of the people. How, for example, would section 6(c) affect the operation of the Dormant Commerce Clause, which forbids States from imposing certain burdens on interstate commerce in areas where Congress has not acted affirmatively to authorize State activity? Would ambiguities concerning the scope of a Federal law authorizing State regulation be resolved in favor the authority of the States to regulate or the authority of the people to engage in interstate commerce in an environment free of State regulation? The breadth and generality of section 6(c) create a risk that unintentional ambiguities in Federal statutes and regulations, with tenuous connections to the balance between Federal and State power, could be exploited in unforeseen ways to frustrate the intentions of Congress and rulemaking agencies.

In short, Section 6 of S. 1214, as drafted, would have far reaching effects. Sections 6(a) and 6(b) would significantly alter the rules under which courts determine the preemptive effects of Federal statutes and regulations. In our view, systematic reform of this nature would only be warranted if Congress were convinced that existing preemption doctrine systematically operates

to frustrate congressional intent (and that statutory rules of construction would produce better results). If, on the other hand, Congress's concerns about current preemption doctrine derive from particular cases or classes of cases, any statutory reform should be tailored to correct the results in those cases or classes of cases. The potential implications of Section 6(c) are considerably more pervasive. Section 6(c) has the potential to frustrate congressional intent and agency undertakings wherever questions arise as to the legal allocation of power between the Federal government and the States. It should be eliminated.

Thank you for the opportunity to share these observations. I will be happy to answer any questions.

T E S T I M O N Y

Statement of
Governor Thomas R. Carper, Delaware
Chairman, National Governors' Association

before the

Committee on Governmental Affairs

United States Senate

on

The Federalism Accountability Act of 1999

on behalf of

The National Governors' Association

July 14, 1999

NATIONAL GOVERNORS' ASSOCIATION
Hall of the States • 444 North Capitol Street • Washington, DC 20001-1512 • (202) 624-5300

Good morning, Mr. Chairman and members of the committee. I am Tom Carper, Chairman of the National Governors' Association. I appreciate the opportunity to appear before you today on behalf of the nation's Governors to testify in support of the bipartisan Federalism Accountability Act of 1999. We appreciate yours and Senator Levin's willingness to work with the staffs of our organizations. As the nation heads towards some of the greatest changes in the history of our economy, we think we now have a critical opportunity to ensure a dynamic federalism for the future.

Strengthening our federalism partnership is a consistent priority of the National Governors' Association. During the last several years, Congress has accomplished much on behalf of state and local governments. We are here to express our appreciation for your work and urge you to keep moving forward on a number of major issues. We are especially grateful to the sponsors of this legislation, you, Mr. Chairman, and Senators Roth, Levin, Robb, Cochran, Breaux, Lincoln, Enzi, Bayh, and Voinovich. I am here today to urge swift action on this bipartisan bill, and to urge a constant effort to maintain the bipartisan nature of this proposed legislation.

As the new information economy transforms this nation, we believe that this legislation will take a key step towards ensuring the ability to innovate and experiment at the state and local level, and that it will better ensure that all levels of government are more accountable to our citizens.

Federalism Progress

In the last decade, we have witnessed major advances as Congress and the Administration have entrusted state and local governments with national goals while using state and local laws, rules, and procedures for effective implementation. We have made major progress in moving from the micro-management historically imposed by the federal bureaucracy toward performance goals and results that foster innovations by states, cities, and counties. We also have achieved significant progress on the judicial front with a series of recent Supreme Court decisions that begin to reassert the federalist principles upon which our country was founded.

Our nation's "laboratories of democracy" are shining brightly all across America in crime reduction, education reform, employment practices, pollution prevention, broad-based health coverage, and multi-modal transportation. Congress and the Administration gave states our version of the Safe Drinking Water Act, stopped the wholesale passage of unfunded mandates, reduced agency micro-management, and gave us new block grants in welfare, transportation, children's health, child care, drug prevention, and statewide health expansions. More recently enacted laws have expanded education flexibility and provided tobacco recoupment protection.

Despite all the benefits conferred to states by devolution, its aggregate impact on federalism has at times been exaggerated. Many of the devolutionary initiatives are better in theory than in practice, either lacking enforcement to make them effective or imposing new burdens on states as conditions of funding. Also, while

devolution has occupied center stage during the past few years, another story has unfolded in the wings with much less fanfare.

I am here today on behalf of the nation's Governors not only to thank Congress and this committee, in particular, but also to express our growing concerns about this new trend. While we appreciate the considerable reduction in the number of unfunded mandates that force the spending of our own funds, states now often face broad preemptions that restrict access to our own funds, laws, and procedures for meeting the people's needs. We must maintain a commonsense approach to government services that makes sense to the people. Only a full partnership between elected officials of all levels of government can make it work.

The New Problem – Preemption of State Authority

While shifting power to the states with one hand, Congress and the Administration also have been busy taking power away from the states with the other. The independence and responsibility that devolution has given states in certain areas has been offset by preemption elsewhere. Even as states have benefited enormously from block grants over the past few years, the federal government has preempted state laws affecting trade, telecommunications, financial services, electronic commerce, and other issues.

Federal preemption of state laws has not occurred as the result of a malicious desire to undermine states' sovereignty. Rather, preemption often has occurred as the unintended byproduct of other issues. Unfortunately the outcome is the same for states, regardless of the motive.

To varying degrees, the federal government has often ignored the powerful role and the constitutional rights of states in the American system of government that enables elected officials of all levels of government to best serve the people. Recent examples of federal preemptions include:

- The Internet Tax Freedom Act, which preempted state and local authority over taxing authority on the Internet.
- The National Securities Markets Improvement Act of 1996, which weakened states' capacity to protect consumers on securities activities conducted within state boundaries and preempted revenue sources for the investigation and enforcement of fraud and other abusive practices;
- The consolidated Farm and Rural Development Act of 1991 preempted state annexation laws making it difficult to provide utility and economic development services in rural areas under state laws; and
- The Telecommunications Act of 1996, which preempted regulation of inherently local business to federal regulators.

Pending bills in Congress that demonstrate this emerging trend include bills on:

- financial services modernization;
- electric utility deregulation;
- electronic signatures;
- the American Homeownership and Economic Opportunity Act;
- broadband Internet access;
- financial records privacy;
- Religious Liability Protection Act;

- teacher liability;
- medical records privacy; and
- The Year 2000 Y2K issues.

We are also concerned about federal preemption made by federal agencies without any clear direction from Congress, much less consideration of consequences to state and local governments. For example, in the April 12, 1999, Federal Register, the U.S. Department of the Interior published a final rule that would authorize the Secretary to permit casino gambling on Indian lands without the state-tribal compact required in the Indian Gaming Regulatory Act of 1988. The rule became final on May 12, 1999.

Under the Indian Gaming Regulatory Act of 1988, authority for Indian tribes to conduct Class III gaming is made conditional upon compacts negotiated with states. Under IGRA, Congress recognized that states are the traditional regulators of gambling. Thus, while Congress permitted the tribes the authority to engage in Class I gaming under their own authority, and Class II gaming also under tribal regulation (so long as states had no criminal laws against such games), the operation of Class III gaming requires that the tribes negotiate with states. In the proposed amendments to 25 CFR 291, the Secretary has proposed that tribes may come to the Secretary for an alternative method of establishing Class III gaming. The nation's Governors strongly believe that no statute or court decision provides the Secretary with authority to intervene in disputes over compacts between Indian tribes and states about casino gambling on Indian lands. The Secretary's inherent authority includes a responsibility to protect the interests of Indian tribes, making it impossible for the Secretary to avoid a conflict of interest or exercise objective judgment in disputes between states and tribes.

This rule is not only a preemption of gubernatorial authority, but also a violation of the Indian Gaming Regulatory Act.

The Future Federalism Problem

Unfortunately, we believe the problem of preemption will worsen. The rise of the new global economy, rapid advances in modern technology, and efforts toward industrial deregulation have accelerated the pace of preemption. To compete with international competitors, respond quickly to technological developments, and maximize opportunities created by deregulation, businesses seek to streamline legal and regulatory requirements. Efforts to substitute uniform national legislation for disparate state laws comprise an important part of this process and have led to federal preemption of state authority in many areas.

Businesses understandably do not want to contend with a myriad of state and local codes, statutes, and rules that prevent them from responding effectively to the rapidly changing dynamics of the domestic and world marketplaces. If industry has to be regulated at all, a standard set of federal laws and regulations presents a far more compelling alternative. However, just as federal laws and oversight serve important purposes that include preventing monopolies, raising revenues to fund national defense, and financing social security, state and local laws fulfill a variety of critical functions as well.

State and local taxing authority provides funds for education, roads, law enforcement, health care, and environmental protection. State banking, insurance, and securities laws impose capital adequacy requirements, underwriting standards,

and licensing procedures that safeguard consumers' deposits and investments and protect against fraud and abuse. State utility regulations ensure that citizens receive high-quality water, electric, sewage, and telephone services at reasonable rates.

The important role of state laws and regulatory responsibilities should not be forgotten in the midst of the scramble to accommodate businesses and react to the forces of globalization, technology, and deregulation. States and their citizens stand to benefit as much as businesses from these changes, but not at the cost of continuing federal preemption of state laws.

The Similarity Between Mandates and Preemption

Nearly four years ago, many of us joined together to halt a rising tide of unfunded federal mandates. We succeeded in the enactment of legislation that helped provide better information and analysis about unintended consequences of federal action before they happened, instead of after the fact. The reports from the Congressional Budget Office demonstrate this bill has not had the impact many in Congress feared—that it would erect significant hurdles to consideration of legislation. Rather the new law seems to have led to much closer consultation between Congress and state and local elected leaders. We believe it has been an effective law that has improved, not hindered governance or accountability.

This new bill is not dissimilar. It focuses on federal preemption of historic and traditional state and local authority. The result of months of negotiations with state and local leaders, it is focused on providing information and consultation

prior to action by either Congress or any federal agency taking any action with federalism implications. The bill would require federal courts to defer to states in any instance in which a federal law does not explicitly preempt states or, alternatively, if there is no direct conflict between the statue and state or local laws, ordinances, or regulations that cannot be reconciled. The bill would enable us to ensure that Congress' intentions are made clear and that they are enforceable to hold federal agencies accountable to Congress and the people.

Practical Consequences of Preemption

Federal preemption of state laws affects states in a number of ways. It can restrict their ability to raise revenue, promote economic development, meet the needs and priorities of the citizens of an individual state or community, and protect their citizens. The following examples, as well as the attachment, illustrate the practical consequences of federal preemption in these four areas:

- revenues (e.g.: Internet Tax Freedom Act);
- sovereignty (e.g. medical records privacy);
- business development and innovation (e.g.: Financial Services Modernization); and
- ability to protect consumers and exercise state enforcement authority. (e.g.: Food Quality Protection Act).

Unlike unfunded mandates, however, once the federal government has preempted traditional state or local authority, that authority is unlikely to ever be returned.

NGA Principles of Federalism

The American federal system established a strong union while preserving the diversity reflected in individual states. State and local governments—governments close to the people—provide the needed opportunities for flexibility and innovation, and by their decentralization of decision-making and responsive nature, encourage citizen participation and support.

Although there is a clear need for national role in a variety of domestic issues, the principles of local determination and diversity require a careful balance of federal and state roles. It is vital to ensure that states have the authority and flexibility needed to respond to the needs of those who live within their boundaries.

We believe the following principles of federalism are essential to the major issues facing states today.

Principles of Federalism

- The U.S. Constitution assigns certain responsibilities to the federal government and reserves the balance to states. Congress should limit the scope of its legislative activity to those areas that are enumerated and delegated to the federal government by the Constitution.
- In cases where Congress expressly determines that federal preemption of state laws is in the national interest, the federal statute should accommodate state actions taken before its enactment.

- The federal government should exercise prudential restraint by refraining from enacting legislative and regulatory measures that preempt the states' ability to craft innovative solutions in areas of state responsibility.
- It is essential that the federal government not preempt, either directly or indirectly, sources of state revenues, state tax bases, or state taxation methods.

State Recommendations

NGA supports this bill, Mr. Chairman, and we urge you to schedule a mark-up as soon as possible. While we do support the legislation, there are a number of important changes that we believe should be made to the bill. First, in Section 5, we believe that the analysis required in committee or conference reports should be expanded. We believe it is critically important for federal officials to understand the effects of legislative and regulatory preemptions on costs, economic development, consumer protections, and state and local enforcement authorities.

Additionally, to ensure greater accountability by Congress, we would encourage amending the bill to provide for a point of order. We believe the point of order under the Unfunded Mandates Reform Act has achieved its purpose without obstructing the process; we believe it an important addition to this bill. Without such a provision, we fear there will be no effective mechanism for enforcing the requirements for an analysis of preemption impacts prior to final passage of a bill.

Finally, in Section 6(b), the Rule of Construction would apply to all rules promulgated after enactment of this legislation. We believe that this subsection should be amended so that the Rule of Construction applies only to federal rules promulgated pursuant to legislation enacted after this legislation.

Conclusion

Because federalism legislation can never be perfect or finished, we are here today to encourage each of you to continue your efforts and expand your good work to this new threat to federalism. We support your efforts to apply these principles of enforceable federalism to legislative and regulatory preemptions of state revenues, laws, and administrative procedures.

When we fail to use these federalism principles—consultation, disclosure, impact statements, deference, and enforcement—we spend even more effort to correct the problems created in areas such as telecommunications, the Internet, environmental laws, local zoning, regulatory preemption, and long-term tax policy. Our message to you is to move forward towards an "enforceable" federalism partnership between elected officials of all levels of government.

We urge you to join us in a revived working partnership involving all of America in our system of government through all of its elected officials. We can best meet the single and special needs of some of the people, while also meeting the collective needs of most of the people.

Thank you very much.

EXAMPLES OF MAJOR PREEMPTION IMPACTS

Consumer Protection

The Senate Banking Committee is considering legislation, the Securities Markets Enhancement Act of 1999 (SMEA), that would undermine states' ability to protect investors from harm. If enacted, SMEA would:

- *Prevent states from denying licenses to rogue brokers.* States would only be allowed to license brokers who are physically located in the state. In most states, however, 90 percent of stockbrokers conducting business in the state are located elsewhere. States would lose the ability to prevent out-of-state brokers with histories of disciplinary action from selling securities to unsuspecting investors.

- *Limit the information that states can collect and disclose.* States would lose control of their public records. The National Association of Securities Dealers (NASD) would be given the authority to decide what information about state-licensed firms and brokers would be made available to the public. Currently, state securities regulators have the power to provide investors with the information they need to make informed decisions about their stockbrokers.

- *Weaken states' enforcement authority.* If the Securities and Exchange Commission (SEC), the NASD, or a stock exchange has already imposed a financial penalty on a firm or broker, states would be prevented from imposing their own penalty. This would weaken states' ability to enforce state securities laws and protect state residents.

Revenue Generation

Congress passed the Internet Tax Freedom Act in 1998, imposing a three-year moratorium on the imposition of new taxes on Internet access. The legislation also established an advisory commission to study issues related to the taxation of electronic commerce and present recommendations to Congress by April 2000.

The Internet Tax Freedom Act prevents states from imposing taxes on Internet access. For a period of three years after enactment of the legislation, states cannot tax Internet access as a means of raising revenues to pay for education, safety, economic development, and other essential public services. It sets a precedent for federal limitation of states' taxing authority. Among other issues, the Internet Tax Freedom Act directs the Advisory Commission to examine "the effects of taxation, including the absence of taxation, on all interstate sales transactions." The commission could recommend imposing a new, expanded moratorium on taxing Internet sales or even an outright ban on such taxes. Senator Robert Smith (R-N.H.) has already introduced legislation this year to extend the existing moratorium permanently. Others, such as House Majority Leader Dick Armey (R-Texas) have recommended not only making the preemption of state and local authority permanent, but also expanding it to state and local sales and use taxes. States that rely on sales taxes to finance government activities would increasingly have to rely on different mechanisms to raise revenues.

Economic Development

In addition to the Internet legislation, which is already harming Main Street retailers through creation of an uneven playing field—so that the bill provides a federally preempted tax haven for some of the world's most powerful corporations--and proposals to preempt state authority with regard to electric utility deregulation—federal action that could force the cost of electricity higher in may states, especially as it would affect small businesses and consumers--one of the best examples was the HUD Fair Housing rule proposed late last year. This federal regulation would have permitted the agency to withhold any housing, community, or economic development assistance to a state or local government if there were an allegation about fair housing practices—whether proven or not, and whether within the authority of that state or local government to act upon it or not. This rule was issued in the Federal Register without any express direction from Congress and without any consultation with leaders of states and local governments. According to the agency, they foresaw no federalism consequences.

Preemption Issues: State & Local Impact

Finance & Administration

National Securities Markets Improvement Act of 1996:

- Preempts state regulation of "covered" securities, including nationally traded securities and investment company securities.
- Weakens state oversight of securities activities conducted within state boundaries and jeopardizes funding source for investigation and enforcement of fraud and other abusive practices.

Financial Services Modernization:

- Legislation would prevent state insurance commissioners from approving mergers or "restricting" or "significantly interfering" with banks' insurance activities.
- Would weaken oversight of insurance industry, endangering policyholders and potentially causing states to lose millions of dollars in premium taxes.

Bank Powers:

- Legislation would render state legislative authority to determine state bank powers null and void.
- Could create uneven playing field for bank branches depending upon their state of chartering, rather than the state law where they are conducting business. Could create some competitive disadvantages for home-based state-chartered banks.

Provider Service Organizations:

- Legislation would exempt Medicare managed-care operations from state insurance regulation.
- Would put pros on same playing field as self-insureds under ERISA. Could expose policyholders to solvency and consumer protection inadequacies without recourse.

Community & Economic Development

Municipal Annexation:

The consolidated Farm and Rural Development Act of 1961 preempts state and local governments from providing a full range of infrastructure and services in an annexed area if a rural utility service has a protected federal loan or loan guarantee on a facility in the area. This makes it difficult for localities to carry out growth and economic development plans under state law.

Public Safety

Police Officers' Bill of Rights:

- Potential preemption of local labor-management policies and practices.
- Federal interference with state authorities and local law enforcement polices and procedures. Would make it very difficult for state and local governments to discipline police officers, and create different treatment for public safety employees than any other state and local employees.

Juvenile Justice:
- Would federalize certain juvenile crimes and impose federal restrictions, requirements, and guidelines.
- Provides unprecedented opportunities to circumvent state law.
- Would require states to prosecute juveniles as adults in certain circumstances and require states to pay costs for released prisoners who are subsequently convicted of other crimes.

Natural Disaster Insurance:
- Contemplated imposition of federal building codes to reduce loss of life and physical damage resulting from catastrophic natural disasters.
- Would mandate that localities pass and enforce certain building standards, not withstanding state law.

Technology & Communications

Electronic Signatures
- Bills establish a uniform national baseline governing the validity of electronic signatures and records.
- Would preempt existing laws in more than forty states governing the use of electronic signatures and records, forcing conformity with federal law.

Y2K Liability Legislation:
- Establishes a federal law dealing with lawsuits resulting from Year 2000 failures.
- Preempts state contract and tort laws as they affect Y2K related lawsuits, makes it easier to remove class-action suits to federal court.

Telecommunications Act of 1996:
- Strips state and local regulators of authority over numerous aspects of local telephony.
- Preempts local taxes on broadcast satellite services.
- Transfers regulation of inherently local business to federal regulators.
- Forces higher taxes and fees on other businesses and residents.

Internet Taxes:
- Preempts state and local taxes and fees on Internet transactions for three years.
- Forces higher taxes and fees on all other businesses and residents and strips states of authority to determine tax policy.

Zoning Authority:
- Industry petition before the FCC would preempt state and local authority over the siting of wireless broadcast transmission facilities.
- Would lose ability to make land use and zoning decisions, to preserve the integrity of local neighborhoods, protect property values, and public health and safety.

Energy, Environment, and Natural Resources

Electric Utility Deregulation legislation:

- jeopardizes state and local authority in many areas.
- State and local governments could lose policymaking and revenue-raising capacity.

Rights-of-Way legislation would:

- jeopardize state and local control over the public rights-of-way.
- States and local governments would lose ability to make decisions regarding the use of public streets, lose compensation in the way of franchise fees.

Food Quality Protection Act:

- Preempts state authority to regulate the use of pesticides.
- State regulations affecting the shipping, handling, and production of food have to conform to federal standards.

Human Development

Medical Records Privacy:

- Would establish a federal standard for the privacy of medical records.
- State laws that establish different standards for privacy would not be valid.
- States would not be able to address special privacy needs in their individual states.

Minimum Wage Increase:

- Requires state and local governments to increase minimum wage paid to employees.
- Would increase salary costs for state and local government employees.

Workplace Safety and Ergonomics Standard:

- Preempts local laws for workplace standards for municipal workers in OSHA state plan states.
- Would create federal standards for workplace safety programs that may require additional staff funding.

Selected Technology Proposals in the 106th Congress
6/29/99

ISSUE	DESCRIPTION	BILLS	SPONSOR	# OF CO-SPONSORS	STATUS	IMPACT ON STATES
Y2K Liability	*Seek to limit Y2K related lawsuits. Some versions cap punitive damages. Various degrees of preemption of state law.*	S. 96	McCain	1	Approved by Commerce	Supersede state laws dealing with contracts, torts, liability, and damages.
		S. 461	Hatch	2	Approved by Judiciary	
		S. 736	Dodd	2	Referred to Judiciary	
		H.R. 775	Davis (VA)	98	Passed by House	
		H.R. 1319	Eshoo	1	Referred to Judiciary	
		H.R. 192	Manzullo	9	Referred to Judiciary	
		S. 1138	McCain	13	Placed on Senate Calendar	
Electronic Signatures	*Affirm the legal validity of electronic signatures and records. Establish a uniform national baseline to promote e-commerce.*	S. 761	Abraham	5	Referred to Commerce	Override state laws governing signatures, records, and contract formation.
		H.R. 1320	Eshoo	9	Referred to Commerce/Govt. Reform	
		H.R. 1714	Bliley	5	Referred to Commerce	
		H.R. 1685	Boucher	1	Referred to Commerce/Judiciary	
		H.R. 1572	Gordon	2	Referred to Science	
Emergency-911	*Establishes 911 as the universal emergency service number.*	H.R. 438	Shimkus	6	Passed by House/	Affects state and local zoning regulations.
		S. 800	Burns	7	Referred to Commerce	
Y2K Loans for Small Businesses	*Authorizes the SBA to guarantee loans made to small businesses to solve Y2K problems.*	S. 314	Bond	27	Signed into Law	No impact.
		Public Law 106-8		--		
Y2K Matching Funds for States	*Provide funding for states to correct Y2K problems in state and local government programs.*	S. 174	Moynihan	6	Referred to Finance	Provide funds to states for system improvements.
		H.R. 909	DeGette	7	Referred to Government Reform	
Internet Tax Moratorium	*Makes the three-year moratium on Internet taxes permanent.*	S. 328	Smith (NH)	0	Referred to Commerce	Eliminates state taxing authority.
Online Privacy Protection	*Protects consumers' personal information.*	S. 809	Burns	1	Referred to Commerce	Preempt inconsistent state laws. Empower state A.G.s to prosecute broadly.
		S. 854	Leahy	0	Referred to Judiciary	
Financial Records Privacy	*Protects the privacy of financial records.*	H.R. 1340	Markey	0	Referred to Commerce	Establish federal standard for financial info disclosure.
		S. 187	Sarbanes	5	Referred to Banking	
Medical Records Privacy	*Protects the privacy of medical records and defines the rights of individuals to access their medical records.*	H.R. 1057	Markey	39	Referred to Commerce/Judiciary	Preempt state laws governing privacy; establish a federal floor for privacy standards.
		H.R. 1941	Condit	33	Referred to Commerce/Govt. Reform	
		S. 881	Bennett	6	Referred to HELP	
		S. 578	Jeffords	1	Referred to HELP	
		S. 573	Leahy	6	Referred to HELP	
Internet Access for Schools and Libraries.	*Funds discounted connections to the Internet for schools, libraries, and health care providers. Terminates the e-rate program.*	S. 1004	Burns	1	Referred to Finance	Changes and decreases funding source for states to connect libraries and schools to the Internet.
		H.R. 1746	Tauzin	15	Referred to Commerce/W & M	
		H.R. 692	Tancredo	32	Referred to Commerce	
Broadband Internet Access	*Deregulates telecommunications infrastructure used for providing broadband Internet access.*	S. 877	Brownback	2	Referred to Commerce	Further reduce state role in telecommunications oversight.
		H.R. 1685	Boucher	1	Referred to Commerce/Judiciary	
Encryption	*Facilitates electronic commerce by allowing encryption to be used domestically and internationally.*	S. 798	McCain	5	Referred to Commerce	Prevent states from requiring use of a specific encryption technology.
		H.R. 850	Goodlatte	255	Reported by Judiciary/Various refs.	

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STATEMENT OF

REPRESENTATIVE JOHN DORSO
MAJORITY LEADER
NORTH DAKOTA HOUSE OF REPRESENTATIVES

ON BEHALF OF
THE NATIONAL CONFERENCE OF STATE LEGISLATURES

BEFORE THE
SENATE GOVERNMENTAL AFFAIRS COMMITTEE
REGARDING S. 1214, " THE FEDERALISM ACCOUNTABILITY ACT OF 1999"

July 14, 1999

Mr. Chairman and members of the committee:

Good afternoon. I am John Dorso, the Majority Leader of the North Dakota House of Representatives. I am also the chair of the Law and Justice Committee of the National Conference of State Legislatures.[1] I appear today on behalf of NCSL to support S. 1214, the Federalism Accountability Act of 1999. NCSL regards the enactment of S. 1214 as one of its highest legislative priorities. It is essential legislation because it addresses the long-neglected problem of federal preemption of state law.

The Problem

The problem is that the frequency and intrusiveness of federal preemption has increased dramatically. As we all know, if a properly adopted federal law conflicts with a state law, then under the Supremacy Clause, federal law trumps state law. Through most of the history of our republic, the federal government used its preemption power sparingly. Congress and federal agencies showed respect for the American tradition that government should be kept close to the people and that most public policy decisions should be made locally. This is no longer the case.

The Problem Generally: An Advisory Commission on Intergovernmental Relations study of a few years ago documented that most of the federal preemption of state law through the history of the republic has taken place since 1970. In the 1990s, the pace of preemption has quickened, and

[1] The National Conference of State Legislatures represents the legislatures of all fifty states and of the American commonwealths and territories. NCSL's members are united in support of restoring balance in our constitutional system of federalism and are opposed to unnecessary federal mandates and unjustified federal preemption of state law.

the impact of preemption is not merely trivial or incidental. As a result of preemption, states have been barred in the 1990s from legislating in policy areas of great importance.

I call it the great power shift. The authority of America's state legislatures is shrinking. This is bad not only for state legislatures but also for the American people, who are increasingly deprived of effective local self-government.

Federalism respects the geographic, economic, social and political diversity of America. Local diversity is ignored when state laws are preempted and replaced with "one-size-fits-all" national policies. The people of Fargo, North Dakota make different policy choices than the people of San Francisco, California. Federalism respects these differences. Federal preemption ignores them, and often ignores them at our peril.

The diversity of states also allows states to act as Justice Bandeis suggested as "laboratories of democracy." States compete with each other, copy each other, and learn from each others' mistakes. It makes for a more vibrant and creative and ultimately more successful policy-making process. The problem with preemption is that it forecloses such experimentation and competition.

Federal preemption also can make government less efficient and less responsive to members of the public as customers. Inevitably, the government in Washington from the perspective of Fargo seems far-away, slow to respond, and often uncomprehending of local conditions.

State government in North Dakota and most other states, by contrast, is very close and customer-friendly. It's like a small retail business. We know the customers personally. We know what they need and what they like. We hear their complaints immediately. We also know our products and services, and can quickly make adjustments to satisfy the customer.

The problem with preemption is that it increasingly makes it difficult or impossible to treat the customer right: to quickly meet the special needs of our local people with common-sense policies based on personal experience. It's just that simple. That's why Congress needs to pass and the president needs to sign S. 1214, so that at the very least the federal Congress, agencies, and courts take a serious look at the preemptive impact of their actions and consider ways of eliminating or mitigating their damaging effects on local self-government.

The Problem of Preemption by Congress: Enactment of S. 1214 is essential, I must say in all due respect, Mr. Chairman and members of the committee, because Congress in the 1990s has been on something of a preemption binge. This is despite the relatively good record by Congress on other federalism issues. Congress is to be commended not only for passing the Unfunded Mandates Reform Act but also for following through by limiting the number of new unfunded mandates and by even rolling back some old ones. We see increasing sympathy in Congress for so-called devolution in grant programs. We see more block grants and somewhat greater flexibility for states in administering programs. This makes the increasing tendency to preempt all the more perplexing. I think this Congress has considerable good will toward the states and wants to make our federalism work better, but more attention must be given to the problem of preemption. The recent record is not good.

Let me cite one example. In 1998, Congress enacted the Internet Tax Freedom Act, imposing a three-year moratorium on state and local tax measures affecting electronic commerce. The result is at least a temporary preemption of state revenue laws. The federal internet law leaves in place a loophole created by the Supreme Court's 1967 decision in National Bellas Hess v Illinois, which effectively exempts most out-of-state mail order and electronic retailers from responsibility for sales tax collection. The result is a current revenue loss, every year, for states and localities, estimated to exceed $6 billion. Under the new federal law, an advisory commission is studying means of encouraging electronic commerce while accommodating state revenue needs. The fear is that the Internet Tax Freedom Act simply sets the stage for permanent preemption of state tax authority over electronic commerce. Bills calling for such permanent preemption have already been introduced or discussed.

Such a permanent preemption could have a devastating effect on states. The National Governors' Association estimates that if Internet sales reach $300 billion, as some project, by 2002, states and localities, if they continue to be preempted, will lose revenues of $20 billion per year. Such federal preemption, I must also say, puts my local retailers in Fargo, who must collect state sales taxes, at a terrible competitive disadvantage. Such unfairness in the treatment of similarly situated retailers is a threat to the whole sales tax system, on which states depend for about one third of their revenues.

Mr. Chairman and members of the committee, my constituents in Fargo know me for what I am, a legislator who believes in small government and lower taxes. I have a record of keeping taxes

low and fair for the people of North Dakota. Federal preemption, of this kind, makes it more difficult for me to pursue my goal of common-sense tax reduction in my state.

Let me give you some other examples. For over 15 years Congress, has considered various proposals to set national standards for product liability lawsuits in state court, and Congress has passed in recent years several more-limited preemptions of state civil law, for example the "Y2K" liability bill.

Again, such preemption presumes states can't handle their own business. I believe in tort reform, and have acted to reform North Dakota's civil justice system to create a better business climate. Most other states have done the same. If a few jurisdictions are out of step, so be it. That probably reflects the will of their citizens. As I noted earlier, San Francisco and Fargo are very different places, but that is the beauty of our federal system. It respects diversity. It also encourages a healthy competition among states. If my state has more business-friendly policies than the next state, North Dakota should benefit from new business investment, creating more jobs.

Electric utility deregulation is another good example of a proposal for sweeping preemption. During the last session of Congress, proposals were made by leading House members and by the Clinton Administration to impose national rules in retail electricity markets.[2] Such preemptive legislation, which is still under consideration, would impose a "one-size-fits-all" federal policy on retail competition that ignores local conditions, values, and cost structures. It could also force

[2] Thankfully, the Senate Energy Committee has expressed strong commitments to state resolution of electric utility deregulation and is proceeding cautiously.

dramatic changes in state and local utility tax structures and franchise fee systems that again are not adapted to local needs and could result in major revenue losses.

I am not saying that electric utility deregulation is a bad idea. I am saying, as with tort reform and state tax reductions, let state legislatures handle the issue. Many states are proceeding rapidly to encourage competition in their retail electricity markets. The states are experimenting with a variety of approaches to deal with such complexities as stranded costs and maintenance of basic service to rural areas. By testing different approaches in different states, we will find out which policies work and which backfire. Also, policy is adapted to local conditions. If my state has a history of high utility rates and unsatisfactory service, as a legislator, I may opt for a policy of rapid open competition. On the other hand, if my state has low rates and good service, maybe as a result of large-scale hydroelectric projects, then the prudent policy may be to move more slowly, making sure that market reforms don't have unintended negative consequences for a system that is already working pretty well for families and businesses in my state. Again, respect diversity and allow states to experiment and compete.

As for other examples, I can name several. State regulation of the insurance industry periodically comes under fire. The Telecommunications Act of 1996 swept much more broadly in preempting state law than it had to. We have seen proposals for national standards for building codes and for a police officers' bill of rights regulating how we deal with our own public employees. Current immigration laws preempt state drivers' license and birth certificate processes. The list goes on and on.

The Problem of Preemption by Agencies: I don't want to suggest that only Congress is to blame. The problem of preemption by federal agency regulation is just as big if not bigger.

Let me give an example of the impact of a preemptive federal regulation on the states. As you know, the Americans with Disabilities Act was written by Congress with lofty good intentions in sometimes very general language. One question that arose was whether the ADA requires states in some circumstances to provide mental patients with treatment in community-based programs rather than in state mental hospitals, as a matter of right. The language of Title II of the ADA does not provide a precise answer to the question. Regulations issued by the U.S. Department of Justice, 28 CFR section 35. 130 (d), however, are more precise: "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[3]

Based in large part on this DOJ regulation, the U.S. Supreme Court recently held in Olmstead v. L.C. and E.W. that in certain circumstances, a state can be found to have discriminated against a mentally disabled person in violation of the ADA by adopting a policy favoring institutional over community-based treatment. Thanks to the DOJ regulation, the door is now open for individual litigants and courts to make what should be essentially legislative policy decisions about how scarce state resources are spent to provide optimal service for a wide variety of mentally disabled persons.

[3] At the time DOJ promulgated this final rule, July 26, 1991, it was still preparing a statement of its federalism impact under E.O. 12612 and promising to provide copies on request.

What should be settled by a state legislature in substantive state law and appropriations for state mental health agencies, now as a result of preemptive federal rulemaking, is regarded as a civil rights issue that may be settled by federal judges. The judges will decide when the costs and program trade-off outweigh the right of a disabled person to "integrated" community treatment.

While I deeply respect the heartfelt concern for the plight of the mentally ill which drove the regulatory and litigation process, I believe there is a serious potential for unintended negative consequences from the DOJ rule and the Olmstead decision. The potential preemption of state law governing mental health policy is broad. The potential cost to states if they provide treatment of the mentally ill is high and, what is worse, unpredictable. It makes the politics of providing better community mental health services potentially much more contentious and difficult.

Now, if you suspect that my position on this issue is hard-hearted or represents some kind of throwback to the bad-old-days when states' rights arguments were used as a cover for state disrespect for civil liberties, let me refer you to a June 9 opinion piece in the Washington Post entitled "Deinstitutionalization Hasn't Worked," by E. Fuller Torry and Mary T. Zdanowicz. The story illustrates the failures and complexities of state mental health policy. Among other arguments, Torry and Zdanowicz say: "Hundreds of thousands of vulnerable Americans are eking out a pitiful existence on city streets, underground in subway tunnels or in jails or prisons because of the misguided efforts of civil rights advocates to keep the severely ill out of hospitals and out of treatment."

Now, I am not suggesting that the authors agree with my assessment of the DOJ regulation, nor do I necessarily endorse all of their criticism of state de-institutionalization policies. No doubt all of us agree that community mental health services must be improved and the dignity and rights of the mentally must be respected. Indeed, that was the noble and lofty goal of the DOJ regulation. The problem that state legislators face is how to do it. How do we make these community programs work? It's easier said than done. My personal view is that it requires more careful legislation and avoidance of litigation, which can harden the parties into rigid positions and create an incentive for states to make policy primarily with an eye toward avoiding lawsuits and costly consent decrees and only secondarily with an eye toward providing the best service for the mentally ill.

Even if you disagree with me and regard the Olmstead decision as a great triumph for the rights of the mentally ill, surely you can see the advantages of extensive consultation between state elected officials and federal agency officials prior to the promulgation of regulations similar to the DOJ rule on "integrating" services for the mentally ill. State legislators are the ones facing the very difficult task of making community mental health services work better than they have in the past. The last thing we want is more homeless and helpless mentally ill roaming America's city streets.

I frankly doubt that DOJ rulemakers had a sufficiently detailed understanding of how the rule impacted mental health law, policy, and politics in 50 states. It is almost certain they did not understand that, given political and policy dynamics in state capitals, the result might be a

deterioration of state services for the mentally ill. This is why state elected officials must be consulted.

Let me give another example. The U.S. Department of the Interior has proposed revisions of regulations governing the secretary's authority to accept title to land to be held in trust for the benefit of Indian tribes and individual Indians. Under the proposed revisions, when an application involves lands located inside the boundaries of a reservation, the secretary will apply a process and a standard reflecting a presumption in favor of acquisition of trust title to such lands.

NCSL believes that such a change in the "land-to-trust" regulations could have a major impact on state and local government tax revenues and regulatory authority. The problem is that the Department in issuing the proposed revision did not comply with Executive Orders 12612 or 13083 on federalism, even while acknowledging that "the local tax base may be affected." The refusal to comply with these executive orders is based on a totally unsupported statement that "because the loss of revenue is minimal", the effects on state and local government are "insignificant" within the meaning of E.O. 13083.

NCSL understands that there is significant opposition to the proposed revisions of the "land-to-trust" regulation from both Indian tribes and state governments. NCSL further believes that states and tribes have in the past and will in the future work on a cooperative basis to resolve revenue and regulatory issues arising in this context. The first step, however, is for the Department of the Interior to comply with federalism executive orders. All parties need to know

how much land is potentially affected, how much state and local tax revenue could be lost, and what the impact would be on state-tribal regulatory issues.

This "land-to-trust" issue, also, highlights the need for passage of S. 1214 and the need for some kind of enforcement mechanism to ensure that agencies fulfill their obligation to perform federalism assessments.

Time after time, agencies either fail to mention federalism executive orders or decline to perform federalism assessments based on unsupported boilerplate stating that the federalism impact will be "insignificant." It's time, Mr. Chairman and members of the committee, for agencies to stop sweeping federalism issues under the rug, by ignoring cost-shifts to states and by ignoring the preemption of state law inherent in proposed regulations.

Agency ignorance of the federalism and political implications of their actions, however, should come as no surprise. My two examples are not exceptions to the general pattern of agency behavior. As you know, having seen the recent GAO report, agencies have ignored with only a handful of exceptions their obligations under Executive Order 12612 to prepare federalism assessments for final rules. It is such a startling statistic: a quantitative measure of the agencies' lack of concern about the impact of federal rules on state and local governments. As you know, out of 11,414 final rules issued by nonindependent agencies between April 1, 1996 and December 31, 1998, exactly 5 contained a federalism assessment.

The Problem of Preemption by Courts: The branch of the federal government about which the states are least likely to complain, when it comes to sensitivity to federalism issues, clearly is the judiciary and the U.S. Supreme Court in particular. With the intellectual leadership of Chief Justice William Rehnquist and Justice Sandra Day O'Connor, who incidentally is a former majority leader of the Arizona Senate, the Court in the 1990s has given new life to long-dormant doctrines of states' rights, especially doctrines of state sovereign immunity. Not surprisingly, this Court has shown a sound understanding of preemption issues. In case after case, the Rehnquist Court has read federal statutes strictly in order to avoid unnecessary preemption of state law. Often, the Court will refuse to preempt absent a "clear statement" of congressional intent or an unavoidable conflict.

Nonetheless, litigants continue to offer, especially to lower courts, creative theories that the state laws, which inconvenience them, have somehow or another been preempted by implication of a federal statute. As Representative Dan Blue of North Carolina, NCSL's President, testified to this committee earlier this year, "implied preemption" is the heart of the problem.

Surprisingly few preemption cases turn on the explicit language of a federal statute and its formal legislative history. Nor do these cases, as frequently as one might imagine, having read the straightforward terms of the Supremacy Clause, turn on a theory of actual conflict: an allegation that it is physically impossible for an individual or corporation to comply with both federal and state law. Rather, as a 1991 report on preemption prepared by the Appellate Judge's Conference notes, "Supremacy clause cases typically call on the courts to discern or infer Congress's preemptive intent." This is a problem which must be addressed.

The Solution

The "Federalism Accountability Act of 1999," S. 1214, should limit unnecessary preemption by all three branches of the federal government. The bill would establish procedural rules for Congress to shine a spotlight on preemptive bills. Reports would be required on the scope of each preemptive measure. And every two years, a report would be made to Congress on the cumulative effect of federal preemption. A rule of construction, to guide the courts, would seek to discourage the many findings of implied preemption that are so often raised in litigation, even though there is no direct conflict between federal and state law and even though Congress has not clearly stated in statutory or report language its intent to preempt state law. Federal administrative agencies would be required to notify and consult with state and local elected officials before issuing preemptive regulations. Agencies also would be required to prepare federalism impact assessments for proposed, interim final, and final rules.

The requirements on the federal government in S. 1214 are relatively modest. There is nothing radical about this bill. Nonetheless, similar modest procedural changes in the Unfunded Mandate Reform Act have been helpful in limiting federal mandates or cost-shifts to states and localities. The hope and expectation is that S. 1214, if enacted, will in the same way help limit federal preemption of state and local law.

We at NCSL look forward to working with all the members of this committee as we move toward mark-up. We understand that some fine tuning of the bill may be necessary. We want a good bill, and a bill that will be signed into law.

The Department of Justice has raised a number of concerns about similar House legislation (H.R. 2245). Some of DOJ's concerns may be valid; others clearly are not. Certainly, it is not our intent at NCSL in supporting S. 1214 to encourage frivolous litigation that would tie the federal agencies in knots. To the contrary, we want the burden of implementing this act to be as light as possible on the agencies, while still meeting its goals. We want agency rulemakers in a positive frame of mind, so that we can have a real dialogue on federalism issues. NCSL accepts that the question of judicial review of agency compliance with the act is one that should be examined closely. Some enforcement mechanism to ensure that agencies perform federalism assessments is required, especially in light of the GAO report. There ought to be a way to enforce the law without inviting a flood of litigation, or otherwise making the lives of agency rulemakers miserable.

On the other hand, DOJ's complaint that federalism legislation would inhibit courts from findings of "field preemption," we think, is without merit. To the contrary, this is the problem that NCSL wants corrected. Courts, or for that matter agencies, have no business finding that the "implied" intent of Congress or simply the alleged comprehensive nature of the federal regulatory scheme requires a holding that states are barred from the policy "field." Far from being objectionable, limiting or eliminating creative legal theories of "implied" or "field" preemption is a key element of this legislation. If Congress wants to totally exclude state

legislatures from a policy field, then it should say so and be held accountable politically. Allowing unelected judges and rulemakers to make decisions of such political import, based on a clever lawyer's theory of implication, would seem unacceptable.

Conclusion

In conclusion, Mr. Chairman, I want to thank you and the original cosponsors for introducing the proposed Federalism Accountability Act of 1999. I especially appreciate the care you have taken to get bipartisan support for this important bill. Bipartisanship is essential if it is to be signed into law. We at NCSL do not regard issues of federalism and preemption to be the property of Republicans or Democrats, nor of liberals or conservatives. Everyone has an interest in making our federalism work as the Framers intended.

NCSL asks all the members of this committee and of the Senate as a whole to co-sponsor and to support the Federalism Accountability Act of 1999. NCSL looks forward to working with all of you to resolve any remaining issues prior to markup. The important thing is for all of us to remember the goal. Preemption must be limited if we are to enjoy the advantages of federalism, which, in turn, fosters policymaking that respects America's diversity and a policymaking process that encourages innovation and responsiveness.

Thank you for this opportunity to testify. I look forward to your questions.

To strengthen and promote cities as centers of opportunity, leadership, and governance

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Mayor, Pembroke Pines, Florida

On behalf of

The National League of Cities

Before the

Senate Committee on Governmental Affairs

On
"The Federalism Accountability Act of 1999"
(S. 1214).

July 14, 1999

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Patricia Poor

Good morning Mr. Chairman and members of the Committee, my name is Alex G. Fekete and I am the Mayor of Pembroke Pines, Florida. I am currently the Vice Chair of the Finance, Administration and Intergovernmental Relations (FAIR) Steering Committee of the National League of Cities (NLC). I am pleased to be here this afternoon to testify before you with my colleagues on what we believe is groundbreaking federal legislation, "The Federalism Accountability Act of 1999" (S. 1214). This bill embraces and preserves the cherished principle of federalism and promotes a new federal –state-local partnership with respect to the implementation of certain federal programs.

I thank the Committee for having this hearing today. I would also especially like to thank the Chairman, Senator Thompson, and his colleague, Senator Levin, for working with the members of the "Big 7" state and local government organizations to craft a bill that illustrates the cooperative and bipartisan dynamic that should exist between our levels of government. At the same time, I would like to recognize Senators Voinovich, Robb, Cochran, Lincoln, Enzi, Breaux, Roth, and Bayh in appreciation for their support in co-sponsoring this legislation. We look forward to working with

the members of this Committee to achieve the true partnership envisioned in this bill.

The National League of Cities is the oldest and largest organization representing the nation's cities and towns and their elected officials. NLC represents 135,000 mayors and council members from municipalities across the country. Over 75 percent of NLC's members are from small cities and towns with populations of less than 50,000.

Whatever their size, all cities are facing significant federal preemption threats to historic and traditional local fiscal, land use and zoning authority. Whatever their size, all cities will benefit from legislation such as S. 1214. We are grateful to you for recognizing that the issue of federal preemption of state and local laws is an important one, not just to us, but to all Americans.

What brings us all here today? It is nothing less than the pervasive and imminent threat of preemption by the federal government. Let me clarify that it is not the intent of NLC to undermine the Supremacy Clause of the Constitution. In fact, I think everyone in the room today acknowledges that there are times when federal law should trump state law – when there is a direct conflict between federal and state law or when it is Congress' express intent to preempt state law. During the 1960's, for example, the nation needed the federal government to move forward with civil rights

legislation that would ensure the equal treatment for all Americans under our Constitution. The problem, however, is not with our dual form of government as it was established by the Framers of the Constitution. Our concern is focussed on the frequency of federal preemption of state and local laws. Moreover, there seems to be a lack of sensitivity on the part of the federal government with regard to local government and the preemptive impact of federal legislation and regulations on local government. It is the National League of Cities' highest priority to put a meaningful check on this preemption of state and local authority. Allow me to cite a few of the invasive actions the federal government has taken in the just last few months.

First and foremost, legislation signed into law last October impedes states' and local governments' ability to tax sales and services over the Internet in the same manner as all other sales and services are taxed – despite the fact that no such limitations would apply to the federal government. There has also been a bill moving quickly through the House of Representatives called the "Religious Liberty Protection Act of 1999," which is a massive preemption of state and local zoning and land use laws. This bill, if enacted into law, would chill a city's ability to apply neutral zoning laws that are applied uniformly to all other land uses in an entire

community from being applied to religious based land uses like churches, synagogues and mosques. Local zoning and land use laws also face severe preemption in the area of takings law, with the re-introduction of takings legislation in the Senate which would allow developers to pursue takings claims in federal court without first exhausting state judicial procedures. Current law preempts municipal authority over the siting of group homes, and preempts a municipality from applying zoning, environmental, health, and safety statutes to railroads. There is no question that the most significant impacts of these preemptions will be felt at home in our nation's cities and towns through the erosion of local tax bases and through the inability to enforce local ordinances enacted for the benefit of all who live in a community.

The amount of federal preemptions is increasing yearly. It is important to note that all of this legislation was either developed or enacted with minimal to no consideration of the consequences to state and local governments. The voices of state and local governments were not heard, or worse yet, were ignored. It is for this reason that my colleagues and I are here this morning – to ensure that state and local governments are not left holding the bag as a result of uninformed federal action. But the news is not entirely bad for cities because there have been some signs that the tide of

federal preemption may be changing. First, the U.S. Supreme Court issued three recent decisions that affirm states' rights and curb the power of Congress to enforce certain federal laws. The Court recognized that our Constitutional framers envisioned freedom being enhanced by the creation of two governments – federal and state. As Justice Kennedy so eloquently stated in the recent decision in Alden v. Maine, "Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. In choosing to ordain and establish the Constitution, the people insisted upon a federal structure for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control." This statement is at the core of federalism and embodies the true federal – state-local relationship that is at the heart of our system of government.

In this ruling, the Supreme Court recognized that preserving the power of self-governance by states and localities is as important to the well-being of our nation as a whole, as is our federal government. The Court further recognized that sometimes a more regional or local approach to

governing is needed, and that the needs of the people are sometimes better met at the local level through the enactment, application and preservation of local laws. The Federalism Accountability Act would help to restore some balance between federal, state and local governance.

Second, NLC and the other members of the "Big 7" state and local government groups have been negotiating with the Administration on a new Executive Order on Federalism. We hope this new Executive Order will serve to enhance the legislation you are considering this afternoon and promote our common goal to work together as partners. NLC, however, believes that legislation is still needed regardless of the existence of an executive order, to ensure that our unique form of federalism becomes revitalized. The reason both a strong Executive Order on federalism and this legislation are needed is because an Executive Order by itself is of limited scope. An Executive order is not law. It does not apply to the independent agencies and there is no provision for judicial accountability. In sum, from a public policy perspective, an Executive Order supporting federalism is helpful in providing guidance on the issue, but it simply does not carry the same weight as legislation. NLC appreciates the intent behind the Administration's efforts and recognizes that the goals of this Executive Order are laudable ones. I ask you, what better first steps are there toward

achieving a federal –state-local partnership than by addressing the issue of federalism on all fronts of national government? Through the Supreme Court's reaffirmation of federalism in Alden v. Maine, through the Administration's Executive Order, and now by this Congress through the passage of S. 1214.

Another reason why this legislation is needed is because despite the overall success of the Unfunded Mandates Reform Act of 1995 (UMRA), there are loopholes that have led to weak enforcement. While well intentioned and certainly a positive step toward achieving greater federal accountability, UMRA "has had little effect on agency rulemaking," according to a recent General Accounting Office report. Congress now has an important opportunity to ensure that the federal government acts responsibly toward its State and local partners, in accord with the principles of federalism established by America's Founders.

Let me now turn to S. 1214. This bill provides cities nationwide with a viable means for alleviating many of the problems associated with federal preemption of local laws.

Mr. Chairman and members of the Committee, we at the local level want to help create a more dynamic federalism. We believe mutual accountability between and among the various levels of government is

essential to the vitality of our federalist form of government and is in harmony with the vision our forefathers had for this country. We want to be your partners in making this vision a reality. We support and want your support for S. 1214.

S. 1214 represents one of the most important efforts to fundamentally rethink the nature and relationship of our federal system and to expand the partnership of elected governmental officials. S. 1214 contains several good tools for creating this new idea of federalism which are beneficial to cities.

Section 4 of the bill defines a public official as including the representative organizations of state and local elected officials, those being the national associations of the "Big 7" state and local government organizations. This inclusion is vital to providing cohesiveness to the consultation provision of the bill. It will make it easier to get state and local input from these national associations who can best represent the views of a cross section of their respective memberships. It also alleviates the burden on the agencies for locating all public officials from jurisdictions that would be preempted by a proposed regulation. It streamlines and simplifies the consultation process for all involved.

Section 5 of the bill requires Senate and House committees, including conference committees, to include a statement with each committee or

conference report on a bill or joint resolution that details the preemptive impact of the legislation, gives the reasons for this preemption, and explains how State or local authority will be maintained following the passage of the legislation. Where there is no Committee or Conference report, there must be a written statement by the Committee or Conference that details the level of preemption.

This section is critical to local governments. So often it is the case that a bill is passed that has severe consequences on our nation's cities because it preempts state and local law. Once such example is the Internet Tax Freedom Act of 1998. Without a committee or conference report or statement to explain the preemption and the reasons behind it, it is impossible for local governments to know whether such impacts were even considered by the Congress. Under this section of the Act, local government is assured of such deliberation.

The above provisions taken together provide for a greater accountability of our federal government. They provide the opportunity for increased input from those most directly affected by a rule or statute, and they provide opportunity for a more meaningful and balanced federalism.

Another very positive and important aspect of this bill is contained in **Section 6**, " Rules of Construction." This section will provide much-needed

guidance at the federal level with respect to the age-old question of "does this federal statute or rule preempt my city's ordinance?" It clarifies instances of federal preemption by requiring that the intent to preempt be expressly stated in the statute or rule, or there is a direct conflict between the federal statute and state or local law. This section should not be interpreted as a prohibition of preemption. To the contrary, this bill recognizes that at times, preemption is appropriate. What this section attempts to do, however, is minimize instances where the intent to preempt is not clear – thus avoiding expensive and adversarial litigation by limiting a court's ability to find that an implied preemption exists. It again makes the federal government accountable for what it does.

This section also creates a presumption against preemption of State and local law and permits cities to govern by requiring that any ambiguity in the Act be construed toward preserving State and local authority. These rules of construction therefore are of vital importance to cities.

Section 7 of the bill spells out several important requirements to ensure that state and local public officials participate in the federal agencies' rulemaking process in an early and meaningful way.

This section directs the heads of federal agencies, who are responsible for implementing this act, to appoint a "federalism officer" within each

agency. The officer would execute the provisions of this Act and serve as a liaison to State and local officials and their representatives; thereby providing cities with an identifiable person who is a point of contact in the rulemaking process. Section 7 additionally requires that agency heads give notice to and consult with state and local elected officials and their representative national organizations early in the rulemaking process, and prior to the publication of a notice of proposed rulemaking, when that rule might interfere with, or intrude upon, the historic and traditional rights and responsibilities of State and local governments.

This provision of the bill requires federal agencies to stop, look, listen and think before they leap into the arena of preemption. It further provides cities with a much-needed voice in the rulemaking process, especially when those rules would have a direct and potentially debilitating impact on our nation's cities. Most importantly, it is an opportunity for local elected officials to work more closely with federal agencies, earlier in the rulemaking process. This will maximize the chance to provide meaningful input and an invaluable exchange of ideas and perspectives. This requirement therefore is mutually beneficial to all levels of government and serves to reinforce the concept of partnership.

This section of the bill furthermore calls for a "federalism assessment" to accompany each proposed, interim final, and final rule in the Federal Register and each rule review submitted to the Office of Management and Budget, when those rules could affect State and local authority. The federalism assessment would detail, analyze, and attempt to justify the extent of the preemption of State or local authority. The assessment would describe the extent to which State or local authority would be preserved after the rule's enactment. It would additionally communicate the agency's efforts to minimize the impact on State and local governments and to consult with public officials, including the concerns of those officials and the extent to which those concerns have been satisfied. Agency heads would have to consider these assessments when promulgating, implementing, and interpreting the relevant rules.

NLC does recognize that S. 1214 as drafted applies to all federal rules and regulations. In order to ease routine rulemaking, as in the case of a city petitioning a federal agency for a 2 hour local bridge closure, we would be willing to work with the committee to establish a threshold for *de minimus* exemptions from the federalism assessment.

In the opinion of local elected officials, the aforementioned provisions would make the federal agencies really think about what they are doing

before they do it. This language in the bill will make the agencies "look outside the box" for help and information, thereby avoiding unsound rules.

Critics of the current federalism legislation have raised the specter of unfettered judicial review under the proposed Rule of Construction. We reiterate, however, that this section was designed to streamline the judicial process. Currently the courts must grasp at legal straws in cases where there is neither an express federal preemption of state or local law contained in a federal statute nor a direct conflict between the federal and state or local laws. The Rule of Construction eliminates the guesswork and makes very clear that absent express preemptive language or a direct conflict, there is no federal preemption. S. 1214 and its companion in the House, H.R. 2245, alleviate from the courts the burden of having to step into the shoes of the federal Congress to determine what Congress intended to do when writing laws. Under S. 1214, Congress must now explicitly state any intention to preempt State or local rights and responsibilities. Any remaining uncertainty in this Act or any statute or rule enacted after this Act would be resolved in favor of maintaining State and local authority.

Last, but certainly not least, **Section 9** of the bill provides cities with an overall check on the federal government's preemption activities. It requires the Director of the Office of Management and Budget (OMB) to

submit to the Director of the Congressional Budget Office (CBO) information describing each provision of interim final rules and final rules issued during the preceding calendar years that preempts State or local government authority. CBO must then submit to the Congress a report on preemption through Federal statutes, rules, court decisions, and legislation reported out of committee during the previous session of Congress. Again, this extra check will help all levels of government track federal activities dealing with preemption and provides information to local governments on this critical issue.

Thank you Mr. Chairman and members of the Committee for your kind attention this afternoon. I would be happy to answer any questions.

Testimony of Ernest Gellhorn
Professor of Law, George Mason University, before
the United States Senate Committee on Governmental Affairs
concerning The Federalism Accountability Act of 1999 (S. 1214) - July 14, 1999

Summary

The cost of federal regulation on the economy is estimated as exceeding half a trillion dollar annually. Much of this cost is borne by state and local governments. Thus, sound policy supports S. 1214 that an analysis of the impact of proposed rules on such governments should be included in agency rulemaking proceedings.

S. 1214, the Federal Accountability Act, would create an "action forcing" command to agencies engaged in rulemaking that they publish "federalism assessments" before issuing any rules that have a "federalism impact." As the experience with the National Environmental Policy Act of 1969 demonstrates, forcing such an assessment by agencies can make agencies sensitive to federalism concerns and lead to more rational and reasonable rules. On the other hand, where such policies are not enforced by judicial review, as illustrated by Executive Order 12612 (on federalism) and by the Regulatory Flexibility Act before 1996 (on small business impacts), which were universally ignored by the agencies, agency compliance is problematical and probably unlikely.

The simplest solution, of course, is for agencies to comply with current federalism requirements because S. 1214 would be unnecessary. However, without judicial review, full-scale compliance is not likely. On the other hand, full judicial review under the Administrative Procedure Act would create a substantial burden undercutting the benefits sought by S. 1214.

Thus, I urge a middle ground for the addition of limited judicial review to S. 1214 patterned after the Unfunded Mandates Reform Act of 1995 and the proposed Regulatory Improvement Act of 1998 (S. 981). First, the federalism analysis required by S. 1214 should be made part of the record for purposes of review of a final rule under the APA. Second, judicial review of the rule under the APA's arbitrary and capricious test should be limited to the procedures used by the agency and the content of its federalism impact analysis. Third, remand or invalidation of a rule should be available only if an agency fails to consult with state/local governments or otherwise fails to perform an impact analysis. No other aspect of S. 1214 should be subject to judicial review.

Finally, at least eight other general analytical requirements cabin agency rulemaking in addition to those imposed by the APA and agency-specific statutes. Not all are consistent; some may now be unnecessary. We need an impact analysis of various impact requirements. These should be reviewed by this Committee and a single statute should encompass all in an omnibus bill.

Testimony of Ernest Gellhorn
Professor of Law, George Mason University, before
the United States Senate Committee on Governmental Affairs
concerning The Federalism Accountability Act of 1999 (S. 1214)

July 14, 1999

Mr. Chairman, thank you for the opportunity to participate in this hearing on S. 1214, the Federalism Accountability Act of 1999. Currently I am a professor of law at George Mason University. I have practiced law for fifteen years and been a law teacher or law school dean for twenty-five, and have written over 100 articles and four books in Administrative Law, Government Regulation and Antitrust Law. My practice has involved me in arguing cases on Administrative Law before Federal appellate courts, including the U.S. Supreme Court. I have served as a public member of the Administrative Conference of the United States and chaired its Rulemaking Committee from 1986 to 1995. I also have served as Chair of the Section of Administrative Law and Regulatory Practice of the American Bar Association in 1990-91 and am currently a delegate to the ABA House of Delegates.

The Federalism Accountability Act proposes to adopt a rule of construction applicable to all legislation adopted by Congress limiting preemption of State or local government law unless expressly stated or unless there is a direct conflict between the new statute and local law. It also outlines a similar "action forcing" command to agencies engaged in rulemaking that they undertake and publish "federalism assessments" before issuing any rules that have a "federalism impact." My comments focus the effect of S. 1214 on administrative rulemaking and, in particular, its effect on judicial review of agency rules.

Background: APA Rulemaking Requirements

Rulemaking plays a critical role in administrative regulation. It is more efficient than case-by-case adjudication because rules give regulated parties advance guidance and can address many issues in a single proceeding. A clear general rule can promote quick and uniform compliance and also provide affected persons and firms with protection against unknowing failure to conform. As the Supreme Court has said, "[w]hen a government official is given the power to make discretionary decisions under a broad statutory standard, case-by-case decision making may not be the best way to assure fairness. . . . [The use of rulemaking] provides [affected parties] with more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated [persons]." Dixon v. Love, 431 U.S. 105 (1977). In additional, the procedures of rulemaking proceedings can put all affected parties of notice of impending changes in regulatory policy, and give them an opportunity to be heard before the agency's position is final and enforceable.

Thus, it is important not to burden agency rulemaking with unnecessary or conflicting obligations. The rulemaking process is neither pro or anti-regulation; agency rules can support as well as undermine federalism. Additions to the rulemaking process should be carefully crafted to ensure that they are clear and simple – and that their benefits exceed their costs.

The Addition of Analytical Rulemaking Requirements

Both the President and Congress have added a substantial number of procedural and substantive requirements for rules having a significant impact on the economy or affecting important interests. Beginning with the Nixon presidency, each Administration has provided

for executive oversight of major rules, including now their advance submission to the Office of Management and Budget for review and approval. Presidential executive orders have required that rules include cost-benefit and risk assessments, promote the President's priorities, measure the impact of the regulation on small business, and avoid adverse effects on family values. See Ex. O. 12912 & 12498, superceded by Ex. O. 12866. Executive Order 12612, adopted in 1987, requires agencies to assess federalism impacts of their rules and to adhere to these principles "to the extent permitted by law." Preemption of statute authority was to be minimized, and state participation in federal proceedings was to be maximized.

Similarly, Congress has sought, by a variety of techniques, to impose regularized control over agency rules, including increasingly stringent requirements for minimizing regulatory effects on small business, state and local governments, and automatic Congressional review of major rules. See Paperwork Reduction Act of 1995; Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act of 1996.

As a result of these pressures, the impact of a proposed rule on the economy, environment, small business, family values, etc., often is identified and monitored. In addition, substantial efforts have been made by agencies to move away from onerous command-and-control regulations where centralized decision makers control products and services and replace them with performance-based standards allowing regulated parties to identify least costly solutions. Perhaps the most successful administrative reform was the National Environmental Policy Act of 1969 whose "action forcing" mechanism – the preparation of an Environment Impact Statement -- required agencies to anticipate the adverse environmental changes their projects might bring about and to consider methods of reducing

and avoiding them. This requirement had a major impact of many agencies. It forced them to prepare detailed interdisciplinary studies, examine alternatives to the proposed action, and explain why a particular result was chosen. See generally Robert Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189 (1986). What made NEPA particularly effective was that it could be enforced in the courts.

Indeed, without meaningful outside oversight or enforcement, agencies often have ignored these requirements. One empirical survey undertaken for the American Bar Association's Section of Administrative Law and Regulatory Practice, showed that requirements not pressed by the Office of Information and Regulatory Analysis (OIRA), the office with responsibility in OMB for implementing the regulatory executive orders, or subject to judicial review, have been ignored rather than implemented by the agencies. See Sidney Shapiro, Political Oversight and the Deterioration of Regulatory Policy, 46 Ad. L. Rev. 1 (1994). Another review of agency rules between 1996 and 1998 by GAO shows that agencies generally have paid only lip service to the Executive Order on Federalism. In fact, EPA did not mention the Order in any of the 1,900 rules issued in this period, and only 5 of over 11,414 agency rules issued during these two years indicated that a federalism impact analysis had been done. General Accounting Office, Federalism: Implementation of Executive Order 12612 in the Rulemaking Process, GAO/T-GGD-99-93 (May 5, 1999).

Federalism Assessments: S. 1214 and Administrative Rulemaking

With the continuing growth in the impact of federal policy on the economy -- some estimates of the cost of agency regulations now exceed half a trillion dollars per year -- it seems only sensible that before new burdens are imposed on state and local government that an

assessment be made of their possible effects (as well as whether their benefits exceed their costs). Regulatory burdens are the equivalent of tax increases except that they are not a visible part of the federal budget. But they are no less burdensome or real.

As the NEPA history shows, forcing an agency to make such an assessment can have a salutary effect on the decision making process. When agencies identify the burdens that a new rule place on other governmental entities and then must justify them, the process itself leads to more careful analysis of whether a rule is necessary or has been properly shaped. The presumption of regularity given administrative actions is based on the hope that agency administrators generally seek to satisfy statutory assignments and that regulators act in accordance with the objectives set for them.

This premise, however, is not always supported by experience. Despite widespread support on a bipartisan basis for federalism requirements for over a decade, they have not been generally implemented by the agencies. While I am not aware of any studies explaining this record, several factors are likely to be involved -- an unawareness of the executive order, an indifference to yet another analytical requirement, constraints on agency budgets, and, most importantly, the absence of any consequences. As the NEPA experience demonstrates, judicial reversal of agency action for inadequate analytical requirements can have a lasting effect on agency behavior. In addition, the federalism requirement in Executive Order 16212 does not appear to be applicable to independent agencies and OIRA apparently has not placed it on its review check list. The absence of judicial review is no accident; the Executive Order on presidential oversight states that it is intended only "to improve the internal management of

the Federal Government and does not create any right or benefit, substantive or procedural, enforceable" against the agencies. Ex. O. 12866, § 10 (Sept. 30, 1993).

Thus, the critical issue in consideration of S. 1214, which would require that agencies engage in federalism assessments before adopting a rule likely to have a significant effect on state and local law, is whether that requirement is enforceable against the agencies.

Judicial Review Agency Rulemaking and Federalism Assessments

As currently drafted, S. 1214 makes no special provision for judicial review. As a result, because it would impose legal requirements on an agency, compliance with S. 1214 would be examined on judicial review of the agency rule under the Administrative Procedure Act. 5 U.S.C. § 706(2). That review would encompass adherence to the procedures and substantive requirements identified in S. 1214 as well as the reasoned decision making mandate of the APA. Under the APA, a person "adversely affected" by a rule could challenge an agency's evaluation of whether the rule would have a significant federalism impact, the methodology of the assessment, its reasoned basis and the reasonableness of the agency's judgment. Thus, to the extent that traditional judicial review of agency decisions involves a "second guessing" of the agency under the "hard look" test approved by the Supreme Court, federalism assessments would be similarly examined.

The Administration has raised an objection to such "unlimited" judicial review as creating "a significant new category of federal litigation" that could result in "injunctions blocking agencies from taking proposed actions." Of course, in the first instance, that would depend on the degree to which agencies continued to ignore the federalism mandate. If they were to comply with its requirements, no such threat exists. On the other hand, the provisions

of S. 1214 necessarily include some ambiguous terms whose meaning can probably be settled only after litigation even if clarified by an OIRA rule. For example, such simple items as "notice and consultation" with state and local governments specified by Section 6(b) are unclear. Is it enough to contact one state or must all be notified; does it make a difference whether the primary or major impact may be in another state; is Federal Register notice (all that is required by the APA) sufficient and, if not, who must be notified in a state or local government? On a more substantive note, each of the content items identified in Section 6(d) could raise similar questions. Does the preemption statement limit later agency claims on preemption (thus encouraging broader claims than otherwise thought necessary); what constitutes "an area of traditional State authority"; how complete must the agency's description of "significant impacts" be and what determines whether something is either "significant" or has an "impact"; must an agency minimize possible impacts on state and local government or is it enough to identify them; etc. This is not to say that the legislation is poorly drafted. In fact, I think this is a skillful draft which fairly identifies both Congress' objectives and how agencies are expected to comply. But if the federalism requirement is to be meaningful, and if agency compliance is to be tested, these and other questions will inevitably arise.

Thus, I believe there is some substance to the claim that adoption of S. 1214 could lead to significant litigation and further expense and delay for agency rulemaking. Of course, much but not all of that litigation burden could be avoided by meaningful direction by OIRA to

the agencies guiding them on how to comply.[1] And the experience with agency flouting of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq., until 1996 when Congress added judicial review of agency compliance with its mandate, 110 Stat. 857, warns of the futility of giving the agencies directions without ensuring their adherence to them. On the other hand, Congress has wisely moved cautiously in adding judicially enforceable burdens on the agencies. For example, when it overwhelming adopted the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1531 et seq., which similarly sought to force agencies to take account of the implications of their regulations on state and local governments (and private entities), it limited judicial review. That is, the Act made no provision for judicial review of the requirements that an agency select the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule" unless it explains why another choice is superior or is dictated by law. See Daniel E. Troy, The Unfunded Mandates Reform Act of 1995, 49 Admin. L. Rev. 139 (1997). Its provision for judicial review of agency compliance with notice, consultation and impact analysis requirements was restricted to their inclusion in the administrative record for consideration by the reviewing court in determining whether the agency's final action was arbitrary or capricious.

Our experience with this more middle ground of judicial review – somewhere between zero and full judicial review -- is too limited to assess its value. But it suggests that until we

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[1] I still lament the decision by Congress in 1995 to defund the Administrative Conference of the United States. This small agency, whose annual cost was less than $2 million per year, provided exactly that kind of guidance to agencies and significantly improved the administrative process. (Its legislative mandate was not repealed so it could be re-established at any time simply by appropriating funds for its support. See 5 U.S.C. §§ 591-96.)

know more, we might follow this limited approach as adopted in the Unfunded Mandates Reform Act and as proposed in the Regulatory Improvement Act of 1998 (S. 981). That is, I recommend that S. 1214 be revised as follows: (1) that the federalism analysis be made part of the rulemaking record for purposes of review of a final rule; (2) that judicial review of the rule under the arbitrary and capricious test (of 5 U.S.C. § 706(2)(A)) be limited to the procedures used and to the content of the impact analysis; and (3) that remand or invalidation be required if the agency wholly fails to consult with state/local governments or to perform a federalism impact analysis. However, other aspects of this federalism mandate -- e.g., submission of the federalism assessment to OMB -- should be exempted from judicial review.

Review of Analytical Requirements.

While I support the concept of a federalism impact analysis for agency rulemaking, I am concerned that too many analytical requirements may be burdening the rulemaking process. Thus, I also urge that this Committee study the possible consolidation of the numerous analytical requirements. There are plenty to review. First, there are the recent requirements imposed by the Paperwork Reduction Act of 1995, the Unfunded Mandates Reform Act of 1995 and Small Business Regulatory Enforcement Fairness Act of 1996. Then there are more general laws such as NEPA as well as agency-specific statutes (e.g., Clean Air Act) which establish additional, sometimes overlapping analytical requirements. And finally there are the Executive Orders which, in addition to the existing Federalism order, include: Regulatory Planning and Review (E.O. 12,866), Civil Justice Reform (E.O. 12,988); Family Values (E.O. 12606) and Indian Tribal Governments (E.O. 13,084). We need, in other words, an impact analysis of various impact requirements in order to assess which are working, which can be eliminated, and which can be refined and/or consolidated. Incorporating all into one statute would ease agency administration and provide simpler instruction to affected parties. And perhaps we would not have to revisit old issues (such as judicial review) again and again.

Testimony of Caleb E. Nelson
Associate Professor of Law
University of Virginia School of Law

Thank you for the opportunity to speak with you today about federal preemption of state law. My testimony will focus on the preemptive effects of federal statutes, but I would be happy to address questions about other types of preemption too. My views should not be attributed to my employer, the University of Virginia School of Law; I offer them in my personal capacity.

Preemption is an important topic. The extent to which federal statutes displace state law affects both the substantive legal rules under which we live and the distribution of authority between the states and the federal government. The sheer volume of litigation about preemption reflects the doctrine's significance; according to Professor Stephen Gardbaum, preemption "is almost certainly the most frequently used doctrine of constitutional law in practice."[1]

Although the Supremacy Clause of the federal Constitution is the reason that valid federal statutes displace contrary state law, the preemptive scope of any particular federal statute is a matter of statutory interpretation. The Supreme Court recognizes this point; assuming that Congress has acted within its constitutional powers, the Court says that the question in preemption cases "is basically one of congressional intent."[2] Unfortunately, the rules of construction that the courts apply in preemption cases do not match up very well with the realities of the legislative process.

In this testimony, I will first discuss some general flaws with the courts' rules of construction, focusing particularly on the Supreme Court's tests for "implied" preemption. I will then offer some concrete examples of cases in which the results of those tests seem, in the words of S. 1214, to be "contrary to or beyond the intent of Congress." I will close by discussing the advantages of substituting new rules of construction for the ones that the Court currently applies.

Flaws with the Rules of Construction that the Court Currently Applies in Preemption Cases

To determine the preemptive effect of any particular federal statute, courts need to interpret the statute and decide what legal rules it establishes. Those legal rules might be either "substantive" rules (which tend to regulate primary conduct) or "jurisdictional" rules (which tend to say that states may *not* regulate primary conduct, or at least may not regulate primary conduct in certain ways).[3] But however one classifies a particular rule, the rule—if it is within Congress's constitutional power to establish—will displace whatever state law it contradicts. The Supremacy Clause says as much.

Federal statutes, of course, can establish rules by implication as well as expressly. In principle, this is no less true of "jurisdictional" rules than of "substantive" rules. It is possible, in other words, for a federal statute to imply a preemption clause, just as it is possible for a federal statute to establish a substantive rule that it fails to state in so many words.

For a clear example, consider the federal Ports and Waterways Safety Act of 1972, which was at issue in the Supreme Court case of *Ray v. Atlantic Richfield Co.*[4] Title I of the Act authorized the Secretary of Transportation to promulgate safety rules for both vessel traffic and shore structures, and a savings clause declared that nothing in the title prevented individual states "from prescribing *for structures only* higher . . . safety standards than those which may be prescribed pursuant to this title."[5] In the overall context of the title, this provision implied that states could *not* supplement the safety standards that the Secretary promulgated for vessel traffic.

To acknowledge that a federal statute can imply a preemption clause, however, is not to suggest that this inference should be drawn too quickly. The rules of construction that the Supreme Court has articulated for preemption cases err in that direction; they risk making judges

too quick to infer broad preemption clauses.

In the past, the Court suggested that the mere comprehensiveness of a federal statute could imply that Congress intended to preempt all state regulation of a particular field.[6] The Court now recognizes that modern federal legislation in complex fields is likely to be detailed whether or not Congress wants to preempt supplementary state legislation, and so-called "field preemption" accordingly has been on the decline.[7] But much of the work that used to be done under the rubric of "field preemption" can still be done under the rubric of what the Court calls "conflict preemption."[8]

Suppose that a federal statute does not contain an express preemption clause. The statute unquestionably will still have preemptive effects; assuming that the Constitution gives Congress the power to enact it, the statute will displace whatever state law it contradicts. But the Supreme Court's current doctrine of "conflict preemption" goes farther. The Court says that "[i]n the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where . . . the state law stands as an obstacle to the accomplishment and execution of congressional objectives."[9] Under this rule of statutory interpretation, federal statutes reflect an "implicit[] pre-emptive intent" whenever state law gets in the way of their "full purposes and objectives."[10] In effect, then, the Court reads all federal statutes that do not expressly address preemption as if they contained the following implied preemption clause: "No state may enact or enforce any law or policy, of whatever type, to the extent that such state law or policy stands as an obstacle to the accomplishment of the full purposes and objectives behind this statute."

The Court sees this test as a means of giving effect to congressional intent. If such a preemption clause were actually to appear in a proposed bill, however, I suspect that many

members of Congress would think that the clause was both too vague and too broad. Let me elaborate on both of these reactions.

First, the clause is vague. In the absence of careful statutory specification of exactly what "purposes and objectives" the clause is referring to, this test for preemption is likely to produce unpredictable results, including results that would not actually have commanded majority support in the enacting Congress. Many statutes, after all, will be the products of compromise; members of Congress who want to pursue one set of purposes will have agreed on language that is acceptable to members of Congress who want to pursue a different set of purposes. Both sets of purposes shaped the statute, but they may well have different implications for state law. It is possible, moreover, that neither set of purposes commanded a majority in Congress; the statute may well have been enacted by a coalition of people with differing goals.[11] A test that tells courts to base preemption decisions on the "full purposes and objectives" behind the statute does not necessarily provide much guidance.

Second, the clause is broad. Even if all members of Congress can agree on the "full purposes and objectives" that lie behind a particular federal statute, they may not want to displace all state law that makes achieving those purposes more difficult. As the Supreme Court itself has acknowledged in other contexts, "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."[12]

This observation is particularly true in preemption cases. As the Court again has acknowledged in other contexts, our federal system is premised on the notion that Congress will not pursue federal policies to the total exclusion of state policies.[13] One of the principal

safeguards on which the Constitution relies to protect state authority is the composition of Congress: rather than being chosen by the nation as a whole, Congress's members are chosen by and answer to state constituencies. In many contexts, then, Congress might well hesitate to accomplish its purposes at the expense of state policies that (in the judgment of the relevant state authorities) serve worthwhile interests in their own right.[14]

It follows that the courts' current rules of construction for preemption cases are seriously flawed. In the name of "congressional intent," every federal statute that does not expressly address preemption is read to imply an "obstacle preemption" clause that the enacting Congress might well have rejected if it had actually been proposed.

Examples of the Gap Between the Court's Preemption Decisions and Congress's Apparent Intent

These problems are not purely theoretical. Let me offer some concrete examples of areas in which the Supreme Court's rules of construction have produced results that are hard to attribute to Congress.

Labor law dramatically illustrates the potential breadth of the Court's tests for "implied" preemption. We can start with § 301(a) of the Labor-Management Relations Act, which gives federal district courts concurrent subject-matter jurisdiction over suits for violation of collective-bargaining agreements.[15] This provision appears to be a naked jurisdictional grant. Ever since the 1950s, however, the Supreme Court has understood it to seek "to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes."[16] According to the Court, use of state law to determine the meaning of collective-bargaining agreements would frustrate this purpose; § 301

therefore preempts state-law principles of contract interpretation, leaving a gap for courts to fill with federal principles developed on the basis of "the policy of the legislation."[17] In order "to assure that the purposes animating § 301 will not be frustrated . . . by state laws,"[18] the Court has held that § 301 also preempts state-law causes of action whose resolution "depends upon the meaning of a collective-bargaining agreement";[19] the Court has held, for instance, that § 301 preempts state-law tort suits against a union for negligent inspection of a mine, when the union's alleged duty arose out of a collective-bargaining agreement.[20] Any doctrine that can tease such sweeping consequences out of a simple grant of concurrent jurisdiction is hard to defend in terms of "congressional intent."

Preemption doctrine under § 301 may perhaps be attributed to the Court's desire to avoid difficult questions about the constitutionality of naked jurisdictional grants. But the Court has also adopted sweeping views of preemption under sections 7 and 8 of the National Labor Relations Act, which protect workers' collective-bargaining rights and prohibit unfair labor practices.[21] In *San Diego Building Trades Council v. Garmon*, the Court concluded that "to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes."[22] As a result, states may not supplement the NLRA with their own provisions about conduct that the NLRA protects or prohibits. The Court has unanimously held, for instance, that the NLRA preempts a state law that prevented repeat violators of the NLRA from doing business with the state.[23]

This conclusion may seem odd enough, but so-called *Garmon* preemption goes much farther. Because the NLRA created the National Labor Relations Board and gave it various powers to enforce sections 7 and 8, the Court has inferred that Congress wanted "to obtain

uniform application of its substantive rules" through "centralized administration of specially designed procedures."[24] To protect this purpose, the Court has concluded that the NLRB enjoys "primary jurisdiction" to determine what conduct the Act protects or prohibits, and that states therefore may not regulate "even . . . activities that the NLRA only *arguably* protects or prohibits."[25]

Indeed, the NLRA preempts state regulation of certain conduct that is not even "arguably" protected by section 7 or prohibited by section 8. With respect to conduct that the NLRA does *not* regulate, the Court asks whether it thinks that Congress intended the conduct to be free from *all* regulation. According to the Court, one of Congress's purposes in enacting the NLRA was to let the results of the collective-bargaining process be determined by the free play of economic forces (subject to the rules set out in the NLRA). Under so-called *Machinists* preemption, state regulation of those economic forces is preempted because it hinders the accomplishment of this purpose.[26] Not surprisingly, the Court sometimes finds it difficult to distinguish conduct that Congress silently intended to be left entirely unregulated from conduct that Congress merely decided not to regulate itself.[27]

Perhaps the excesses of "implied" preemption in labor law owe more to the doctrine of *stare decisis* than to the Court's current methods of statutory interpretation. Over the last two decades, the Court has taken some steps to rein in the potential breadth of "implied" preemption; while retaining its expansive formulation of the test for "obstacle" preemption, the Court has counterbalanced this test by invoking some version of a presumption against preemption. Still, the combination of a broadly worded test for "obstacle" preemption with a presumption that points in the opposite direction has not made for clarity or predictability. The Court's

preemption decisions may have been narrower outside of labor law, but they have not been much easier to trace to Congress's statutes.

Consider the Clean Water Act. In a 1987 decision, the Court held that the Act does not preempt state-law nuisance actions against entities that cause harm to property owners in one state (the "affected" state) by discharging effluents into the waters of another state (the "source" state).[28] Surprisingly, however, the Court concluded that the Act *does* preempt the choice-of-law rules that would otherwise apply to such suits. Because the Act gives the federal government and the source state more power than affected states over the issuance of discharge permits, the Court held that nuisance liability had to be determined under the law of the source state rather than the law of any affected states.[29] For reasons that the Court has never fully explained, this is so *even if the source state's own choice-of-law rules would call for application of an affected state's law.*[30] But while the purposes behind the permitting process allegedly require source states to apply their own nuisance law, the Court has subsequently decided that the statute leaves the EPA free to condition permits on compliance with the law of affected states.[31]

Or consider the customs statutes. Federal law normally subjects imported goods to customs duties. But if the owner of the goods stores them in a "bonded warehouse," federal law defers the customs duties during the period of storage; the duties become due only when the goods are withdrawn from storage, and they are waived entirely if the goods are withdrawn for purposes of reshipment abroad.[32] There is no connection between this statutory scheme and the property taxes that many states impose on the owners of certain types of goods. Accordingly, the Court has unanimously held that Congress's decision to defer federal customs duties on imported goods stored in bonded warehouses does not preempt state laws imposing property taxes on the

owners of those goods during the period of storage.[33] If the imported goods being stored in the bonded warehouse are intended for reshipment abroad, however, the Court has held that state property taxes *are* preempted during the period of storage.[34]

Again, it is hard to explain this distinction in terms of any "congressional intent" reflected in the relevant statutes. According to the Court, Congress waived the federal duties on goods withdrawn from storage for reshipment abroad "in order to encourage merchants here and abroad to make use of American ports." But Congress's decision to *defer* federal customs duties on *all* imported goods stored in bonded warehouses presumably serves the same purpose. The fact that the system of "bonded warehouses" encourages merchants to use American ports, moreover, does not automatically mean that Congress wanted to maximize this encouragement by preempting state property taxes during the period of storage, any more than it means that Congress wanted to make states give merchants cash bonuses for using American ports. As Justice Powell noted in a lone dissent, it would have been perfectly reasonable for Congress to promote foreign trade by providing for duty-free storage without also providing an exemption from state property taxes. The federal customs statutes, then, do not seem to imply any policy regarding state property taxes.

For a final example of the unpredictability in the Court's preemption decisions, contrast the Court's treatment of the federal patent statute with its treatment of the federal copyright statute. Both statutes grant temporary monopolies in order to encourage certain intellectual creations, but both statutes limit those monopolies in apparent recognition of their dangers. For many years, neither statute contained a preemption clause.[35] The Court has nonetheless held that states cannot supplement the federal patent statute by giving "patent-like protection" within their

borders to creations that do not qualify for nationwide protection. In *Bonito Boats v. Thunder Craft Boats*,[36] for instance, the Court unanimously held that Florida could not prohibit boat manufacturers from using the "direct molding" process to copy another manufacturer's hull design. At the same time that it was developing this doctrine, however, the Court held that states *could* supplement the federal copyright act; in *Goldstein v. California*,[37] for instance, the Court held that California could prohibit audiotape manufacturers from copying sound recordings made by musical artists. While one can try to reconcile these decisions, it is not clear that the reconciliation has anything to do with congressional intent or the statutes that Congress actually enacted.

The Rule of Construction in S. 1214

In recognition of the problems with the rules of construction that the courts currently apply in preemption cases, the bill before you seeks to establish a different rule of construction. S. 1214 seeks to lay out new ground rules for the interpretation of federal statutes, so that the courts are working off the same page as Congress.

Section 6(a) of S. 1214 tells courts that henceforth, when Congress enacts a federal statute that does not expressly address preemption, the statute should not be read to preempt a rule of state law unless the federal statute and the state-law rule are in "direct conflict." Although the meaning of this phrase may not be entirely clear, section 6(a) suggests that the federal statute will preempt a state-law rule only if "the two cannot . . . consistently stand together"—only if applying the state-law rule would entail disregarding a valid rule established by the federal statute. State law would be preempted to the extent that it purports to authorize something that

federal law validly prohibits, to prohibit something that federal law validly authorizes, or to penalize something that federal law validly gives people an unqualified right to do. But state law would not be preempted simply because its effects would stand as an obstacle to the purposes and objectives that lie behind the federal statute. As I understand section 6(a), then, it tells courts not to read broad "obstacle preemption" clauses into federal statutes enacted after the Act's effective date. Section 6(c) tends to confirm this interpretation; to the extent that a federal statute is ambiguous about whether it implies an "obstacle preemption" clause, section 6(c) indicates that it does not.

Section 6(a) does not prevent Congress from providing for obstacle preemption in appropriate circumstances. If Congress wants to preempt not only those state laws that are in "direct conflict" with a particular statute, but also all state laws that would hinder the accomplishment of the purposes and objectives behind the statute, Congress need only enact a preemption clause to that effect. Congress is already familiar with such provisions; at least one federal statute includes an express "obstacle preemption" clause.[18] But federal statutes enacted after the effective date of the Act would no longer be deemed to establish such provisions by default. In the absence of a deliberate decision by Congress to preempt all state law that stands in the way of federal purposes, courts would not try to reconstruct those purposes on the assumption that Congress wanted to pursue them at all costs. This result seems perfectly consistent with principles of federalism and the separation of powers, which both suggest that policy decisions about preemption should be made by Congress rather than the judiciary.

Aside from its effects on "obstacle" preemption, section 6 would reinforce the courts' current reluctance to read federal statutes to occupy an entire field by implication. I doubt that

section 6 would eliminate implied field preemption entirely. Some federal statutes—like the Ports and Waterways Safety Act that I mentioned earlier—may unambiguously imply a jurisdictional rule excluding states from a particular area, and state efforts to regulate that area would be in "direct conflict" with this (implied) rule. Still, if a federal statute does not expressly occupy a particular field, section 6(c) would tell courts to infer field preemption only if the implication is unambiguous. If Congress wants to occupy a particular field, then, the better practice would be to make sure that the text of the statute says so expressly. This result too seems sound. If a federal statute does not exclude states from a particular field either expressly or by necessary implication, then it is reasonable to presume that states can supplement the federal statute with (nonconflicting) laws of their own.

In sum, the combination of section 6(a) and section 6(c) would restrain the courts' tendency to infer preemption clauses that federal statutes do not actually establish. In this respect, section 6 is likely to bring the courts' preemption decisions closer to Congress's true "pre-emptive intent."

Section 6(c) would also affect the interpretation of express provisions of federal law, including substantive legal rules as well as express preemption clauses. It would reinforce the courts' recent tendency to read express preemption clauses narrowly.[39] It would also tell courts to resolve ambiguities in express provisions of substantive law in a way that minimizes their preemptive effect.

This aspect of section 6(c) may have some unanticipated consequences. But if Congress is concerned that section 6(c) will cause a particular statute to be read too narrowly, it is free to enact a different rule of construction for that statute; it can specify, for instance, that

notwithstanding section 6(c) of the Federalism Accountability Act of 1999, the statute's express provisions should be read without any special presumptions either for or against preemption. As long as Congress knows what the background rules of construction are, it can always legislate around them in appropriate cases.

As a practical matter, then, section 6(c) would probably have its greatest effect where members of Congress have not reached a collective agreement about how a particular statutory provision should be read. Perhaps the provision contains a latent ambiguity that members of Congress did not know about. Or perhaps members of Congress recognized the ambiguity, but were unable to agree about how to resolve it. Section 6(c) reflects the view that the political safeguards of federalism work best when Congress confronts these difficult issues itself instead of tacitly leaving them for the courts.

In this sense, section 6(c) is a mechanism for self-discipline. Unless members of Congress agree to exempt a particular statute from its rule of construction, section 6(c) would reduce any institutional incentives to enact deliberately ambiguous language in an effort to pass difficult policy questions on to the courts. Of course, when Congress enacts language that is inadvertently ambiguous (or that the courts take to be ambiguous), section 6(c) might drive preemption decisions away from what members of Congress intended. Whether the need for self-discipline outweighs this potential effect is a policy question that I am not in a good position to address.

Overall, I think that the rule of construction set out in S. 1214 would be an improvement upon the rules of construction currently articulated by the courts. In areas where the Constitution allows Congress to withdraw power from the states, Congress should certainly be able to

preempt state law when it wants to do so. But the mere fact that a federal statute serves certain purposes and objectives does not automatically imply that Congress wants to displace all state law that might get in the way of those purposes. Section 6(a) would remind courts that no legislation pursues its purposes at all costs. At the same time, section 6(a) leaves ample room for Congress to enact broad preemption clauses when it actually wants to do so.

ENDNOTES

1. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994).

2. *See, e.g.*, Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 30 (1996).

3. I borrow this terminology from Professor Tribe. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 481 (2d ed. 1988). On occasion, the Supreme Court has distinguished between the "substantive" and the "pre-emptive" meaning of a statute. *See* Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 744 (1996). I prefer Professor Tribe's terminology, because "substantive" rules of federal law do have preemptive effects; if they are within Congress's power to establish, they displace whatever state law they contradict.

4. 435 U.S. 151 (1978).

5. Ports and Waterways Safety Act of 1972, § 102(b), 86 Stat. 424, 426 (emphasis added).

6. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

7. *See* Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 717 (1985); De Canas v. Bica, 424 U.S. 351, 359-60 (1976); New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 415 (1973); *see also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) (remarking that "our recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it").

8. *See, e.g.*, English v. General Elec. Co., 496 U.S. 72, 79 n.5 (1990) (acknowledging that "field preemption" cases can be recast as "conflict preemption" cases); Gade v. National Solid Wastes Mgt. Ass'n, 496 U.S. 72, 104 n.2 (1992) (plurality opinion).

9. Northwest Central Pipeline v. State Corp. Comm'n of Kansas, 489 U.S. 493, 509 (1989).

10. *See Barnett Bank*, 517 U.S. at 30-31. For general statements of the Court's test for "obstacle" preemption, see, e.g., Boggs v. Boggs, 520 U.S. 833, 844 (1997); Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995); Gade v. National Solid Wastes Mgt. Ass'n, 505 U.S. 88, 98 (1992); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991); English v. General Electric Co., 496 U.S. 72, 79 (1990); California v. ARC America Corp., 490 U.S. 93, 100 (1989); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 79 (1987); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985); Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 468 U.S. 491, 501 (1984); Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd., 467 U.S. 461, 469 (1984); Exxon Corp. v. Eagerton, 462 U.S. 176, 182 (1983); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev't Comm'n, 461 U.S. 190, 204 (1983); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); Edgar v. MITE Corp., 457 U.S. 624, 631 (1982); Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978).

11. *See generally* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

12. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646-47 (1990); Rodriguez v. United States, 480 U.S. 522, 525-26 (1987).

13. *See* Garcia v. San Antonio Metropolitan Trans. Auth., 469 U.S. 528 (1985); *see also* Herbert Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954).

14. *Cf., e.g.*, Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 98 (1988) (arguing that under the Court's approach to preemption, "congressional 'intent' is analyzed as if the states did not exist").

15. *See* 29 U.S.C. § 185(a).

16. Lingle v. Norse Div'n of Magic Chef, Inc., 486 U.S. 399, 404 (1988).

17. *See* Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 455-57 (1957); Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962).

18. Livadas v. Bradshaw, 512 U.S. 107, 122-23 (1994) (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985)).

19. *Lingle*, 486 U.S. at 405-06.

20. *See* United Steelworkers of America v. Rawson, 495 U.S. 362 (1990).

21. *See* 29 U.S.C. §§ 157, 158.

22. 359 U.S. 236, 244 (1959).

23. Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282 (1986).

24. Garner v. Teamsters, Chauffeurs & Helpers Local Union, 346 U.S. 485, 490 (1953).

25. *See, e.g.*, Building & Constr. Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 225 (1993); Golden State Trans. Corp. v. City of Los Angeles, 475 U.S. 608, 613 (1986); *Gould*, 475 U.S. at 286; Belknap, Inc. v. Hale, 463 U.S. 491, 498 (1983); *Garmon*, 359 U.S. at 244-46.

26. *See* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 145-151 (1976).

27. *Compare, e.g.*, Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) (holding that NLRA preempts city's decision not to renew taxicab company's franchise, when the reason for the decision was that the company had failed to come to terms with striking employees) *with, e.g.*, New York Telephone Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979) (holding, in splintered opinions, that NLRA does *not* preempt state's decision to pay unemployment compensation to striking employees and to impose most of the cost of these payments on the employer whose employees were striking).

28. *See* International Paper Co. v. Ouellette, 479 U.S. 481, 497-500 (1987).

29. *See id.* at 489-91, 494-97.

30. *See id.* at 499 n.20.

31. *See* Arkansas v. Oklahoma, 503 U.S. 91 (1992).

32. *See* 19 U.S.C. §§ 1555(a), 1557(a).

33. *See* R.J. Reynolds Tobacco Co. v. Durham County, North Carolina, 479 U.S. 130 (1986).

34. *See* Xerox Corp. v. County of Harris, 459 U.S. 145 (1982).

35. Effective in 1978, Congress added express preemption and savings clauses to the Copyright Act. *See* 17 U.S.C. § 301.

36. 489 U.S. 141 (1989).

37. 412 U.S. 546 (1973).

38. *See* 49 U.S.C. § 5125(a).

39. *See* Cipollone v. Liggett Group, Inc. 505 U.S. 504, 516 (1992); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

Testimony

of
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before the

United States Senate
Committee on Governmental Affairs
regarding

S. 1214
Federalism Accountability Act of 1999

Washington D.C.
July 14, 1999

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today regarding S. 1214, the "Federalism Accountability Act of 1999."

I teach environmental law at the University of Maryland Law School, where my students and I represent citizens' groups concerned about local pollution problems in their neighborhoods and where I teach a seminar on the interaction of science and the law.[1] Before joining the faculty, I spent many years advocating the interests of local governments before Congress, EPA, and the courts. And before those years in private practice, I was staff counsel to the House Commerce Committee. So, to paraphrase the song, I see these issues from all sides now and I think I understand both why you are concerned about the state of federalism today and how difficult it is to craft good solutions.

My testimony makes two related points about federalism in general and the legislation in particular:

[1] Please note that I appear today as an individual and not as a representative of the University of Maryland or my clients.

1. Just as state and local governments tell you that "one-size-fits-all" regulation is ineffective, "one-size-fits-all" devolution could prove harmful to some of our most important national values. Specifically, in the area of health and safety regulation, continuation of a strong federal role is justified by the same principles that motivated Congress to legislate actively in these areas over the last three decades.

2. The legislation you have drafted is ambiguous, and could create enough uncertainty that it would actually retard the efforts of EPA and other agencies to reinvent themselves in a way that strengthens federalism without sacrificing the progress we have made in protecting public health. If you believe that it is necessary and possible to legislate comity between national and subnational governments, I hope you will consider modifying its provisions.

The Dangers of Unrestricted Devolution

As my colleague, Professor William Galston of the University of Maryland School of Public Affairs, recently testified before you a few weeks ago, American government is based on the brilliant and enduring theory that supreme political authority resides in no one level of government but instead is shared between them in what founding father James Madison described as a "compound republic." Throughout our history, national and subnational governments have constantly renegotiated how they divide power, with the active participation of legislative bodies, the courts, and, in the 20th century, administrative agencies. There is no shortcut, no silver bullet that can sort responsibilities and authority across the full range of issues in a single stroke. Rather, as government is confronted with ever more complex and difficult issues, these negotiations must become ever more painstaking, both because the stakes are high and because the problems are so hard to resolve.

Each level of government has crucial roles to play as we enter the next century. The national government can distribute the economic burden of public policies more equitably than the states. It is the guarantor of civil rights. The United States engages our best scientific and technical resources to find solutions to problems that would overwhelm individual states. Last but not least, and this point too often gets lost in the debate, uniform federal regulation is the backbone of a strong economy because it provides a "level playing field" for industries that sell goods and services in both national and international commerce.

On the other hand, as Justice Brandeis observed seven decades ago, state and local governments are America's "laboratories of democracy," not only experimenting with innovative approaches that elude a ponderous federal bureaucracy, but engaging the public at a level more direct and effective than the national government could ever hope to achieve. Without the active participation of strong state and local governments in the daily lives of the American people, we would have a democracy that was hollow and, as a result, dangerously weak.

In recent years, state and local governments have been on the march, decrying unfunded mandates and demanding an equal seat at the tables where national policy is forged. Their crusade is both an understandable and predictable reaction to truly breathtaking federal forays into areas that once were the exclusive province of the states, as well as the infuriating reality that federal aid to implement programs has declined steadily over the last two decades. Unfortunately, however, as in any crusade, the rhetoric of the moment has obscured the reasons why Congress acted to expand federal power, running the real risk that unrestricted devolution will return us to the proverbial "square one"of efforts to solve our most intractable national problems.

From what I can tell from the testimony you have received thusfar, the motivation for the legislation now before you is state and local government opposition to federal preemption in such areas as revenue (e.g., taxes on usage of the Internet), medical records privacy, and the modernization of financial services.[2] I am not an expert on these issues, and will not presume to address the nature and scope of the devolution that is appropriate to resolve them. What is clear is that the principles that should guide you in those contexts have little if any application to the issues posed by the centralized health and safety regulation that has so improved the quality of our lives.

Take, for example, environmental protection, the unacknowledged poster child of the unfunded mandates movement[3] and a superb example of the painstaking debate over how to sort responsibility in a compound republic. What ideas should guide congressional decisions on "dividing the job" among the three levels of government in that area?

When EPA was created in 1970, Congress could only have guessed at the complexity of the new agency's mission. As our understanding of that mission deepens, economies of scale in accomplishing the scientific and technical research essential to meaningful health and safety regulation are the most compelling reason for centralized regulation and against unrestricted devolution.

A recent EPA report found that there is no toxicity information available for 43 percent of the 2,863 organic chemicals bought and sold in amounts above one million pounds every year in

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[2] See, e.g., Testimony of Raymond C. Scheppach, Executive Director, National Governors' Association, before the Committee on Government Reform, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, U.S. House of Representatives, June 30, 1999.

[3] During the floor debate on the Unfunded Mandates Reform Act of 1996, environmental mandates were invoked to justify the legislation about two-thirds of the time. However, UMRA was never portrayed as an environmental measure by either its proponents or the media.

this country, and that a full set of basic toxicity information is available for only seven percent.[4] Our ignorance regarding the risks posed by these common pollutants is shocking, not least because we have the physical ability to conduct the scientific inquiries necessary to develop this information, but have not made such research a priority.

Another dimension of the information deficit that undermines environmental policy is our ignorance concerning the actual state of the ambient environment. As documented extensively by former EPA Chief of Staff Michael Vandenbergh, the fragmented and inconclusive efforts we have made to characterize these conditions undermines further progress in cleaning up and preventing pollution.[5]

Finally, we lack the technology we need to mitigate environmental risks. Our multi-billion effort to clean up toxic waste sites has foundered on the horns of this dilemma.[6] If we knew how to neutralize the old dumps and other pieces of contaminated land that mar the landscape, we could revitalize the inner city, prevent urban sprawl, and spur economic development in the areas that need it most.

All three of these data gaps cripple EPA's efforts to establish priorities, assess risk, and get results.[7] Closing them is a task that deserves resources only the national government can provide, and it would be pointlessly inefficient to duplicate such efforts in each of the 50 states. Further, incentives to develop new technology are far more easily provided by a national market for pollution control, prevention, and remediation than the inconsistent and unpredictable economics

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[4] *EPA Analysis of Test Data Availability for HPV Chemicals*, 22 CHEMICAL REG. REP. 261 (1998).

[5] Michael P. Vandenbergh, *An Alternative to Ready, Fire, Aim: A New Framework to Link Environmental Targets to Environmental Law*, 85 KY. L. J. 803 (1996-97).

[6] For a discussion of the technical difficulties that have plagued the Superfund program, *see*, Rena I. Steinzor & Linda E. Greer, *In Defense of the Superfund Liability System: Matching the Diagnosis and the Cure*, 27 ENVTL. L. REP. 10,286, 10,287-289 (1997).

[7] The two best discussions of the implications of the dearth of data for environmental quality are reports issued by EPA in an effort to reexamine national environmental priorities. The first, an analysis by its career staff of the environmental problems that should be on the Agency's regulatory agenda, was published in 1987. U.S. EPA, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS (1987). The second, a review by EPA's Science Advisory Board of the first report, contained its own recommendations for the Agency's future direction. U.S. EPA, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION (1990).

of 50 smaller jurisdictions.

Federal regulation of environmental problems is also necessary to address the effects of pollution that crosses state lines, or so-called "transboundary" pollution. Only the most diehard federalist would disagree that if industry within one state can manage to export most of its pollution to another state, the source state is unlikely to impose effective controls and the receiving state lacks the leverage to protect itself. The transboundary rationale applies in any situation where pollution is transported across state lines via the ambient air or interconnecting natural geology such as rivers or aquifers.

Finally, the national government must play a role in assuring uniform, minimum standards of protection that give every American a chance to have good health. Conservative commentators have called environmental protection a "luxury good," affordable in flush times, expendable in tough times, and presumably out of reach for poor people no matter what the state of the economy.[8] While only a small minority of Americans would agree with this assessment, the unrestricted devolution of fundamental regulatory decisions to the state and local level could well make it a reality. Principles of equity and equal protection demand the establishment of baseline national standards so that Americans are not exposed to fundamentally unequal levels of environmental risk.

The need for baseline standards is particularly acute given the unequal distribution of environmental problems in society. The disproportionate effects of pollution on low income, minority communities is increasingly well-documented.[9] If determining the level of protection became the sole province of such communities, gross discrepancies between the exposures tolerated by poor and minority Americans and those tolerated by the middle and upper class would increase. Not only do low income communities lack the resources to devise effective regulation, they are considerably more vulnerable to threats that they must choose between jobs and protecting the environment. They are also overloaded with other social problems that compete for resources and the attention of the body politic.

Of course, none of these principles mean that the federal government can or should do the

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[8] *See e.g.*, P.J. O'ROURKE, ALL THE TROUBLE IN THE WORLD 201 (1994):

> Neither is a "clean environment" a political right of humans. Rights must be free . . . . You have the right to bear arms. You don't have the right to take a gun without paying for it. Pollution control is not free. . . . The environment turns out to be the "luxury good" that Cato Institute's Jerry Taylor said it was.

[9] *See e.g.*, Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993).

job alone. Federal regulations should only impose requirements that make sense in the context of specific local conditions. Even where federal regulatory mandates are justified, state and local governments should have adequate flexibility to implement them in the most cost-effective manner. Rigid edicts handed down from Washington hamstring state and local officials who are already under pressure to resolve a lengthening list of difficult social problems with an ever-diminishing public fisc.

In some instances, the best way to address the issue of local implementation is for the federal government not to regulate. In others, a national standard is necessary, but the regulations should include a workable, accessible system for granting waivers or exceptions. In all instances, the federal government should refrain from micromanaging local implementation to the point where money is wasted on expensive technologies or other compliance methods. But there simply is no way to accomplish all of these important reforms quickly and efficiently without considering the details of EPA's authorizing statutes and the rulemakings they require.

The Unforeseen Consequences of S. 1214

Will the legislation now before you help or hinder the renegotiation of environmental policy that all agree is necessary in the immediate future? The problem is that it is very difficult to tell.

At one level, S. 1214 is a straightforward recitation of the way the federal government – including agencies and departments responsible for safeguarding the public health – should behave. Of course Congress and the Executive Branch should be careful about preempting long-standing and wise state and local laws. Of course federal officials should consult with representatives of state and local governments about the creation and implementation of federal programs.

Yet if this is all the sponsors have in mind, there are other, more effective ways for Congress to use its considerable power to change the way agencies, departments, and even your own committees behave. You have considerable clout in the oversight process, you hold the purse strings, and you have the authority to amend specific statutes to change the way they affect local governments, starting with the provisions that have motivated the legislation now before you.

The apparent determination of the sponsors to make legislate common sense and make it legally binding and the legislation's vagueness on the methods available to enforce it suggest, however, that it is designed to achieve more than persuading the Executive Branch to be more respectful towards the states. I am going to assume, therefore, that the legislation's sponsors are committed to a new process, one that is binding on agencies and departments, one that changes the way they do their daily business, and one that is enforceable by aggrieved state and local governments. There are several crucial implications that flow from this interpretation of the legislation's intent.

First and foremost, the legislation's central terminology is vague, and susceptible to so many different interpretations that it could provoke years of time-consuming litigation of questionable value to the achievement of its ultimate goals.

For example, consider the requirement in section 5 that conference reports include "an explicit statement on the extent to which the bill or joint resolution preempts State or local government law, ordinance, or regulation and, if so, an explanation of the reasons for such preemption." Does the statement need to identify with precision each and every affected law, or will a mere description of the categories of laws potentially effected suffice? If the legislation intends a precise list, how many additional resources will be necessary to perform such an arduous task? What if the conference committee makes a mistake during the rush of other business that is so typical of such efforts? Is the law invalid?

As another example, consider section 6(a), which sets forth the truly remarkable statement that once the legislation is enacted, any law passed after that date will not preempt any state or local government law, ordinance, or regulation unless the statute "explicitly states" that "preemption is intended" or there is a "direct conflict" between the federal and state or local law. Once again, how explicit must these statements be? How "direct" must the conflict be? If industry can comply with both the federal and the state or local requirement, but doing so will cost significantly more, will the state or local law stand? Such are the perils of one-size-fits-all devolution.

Finally, section 7 of the legislation requires that agencies like EPA "notify, consult with, and provide an opportunity for meaningful participation by public officials of governments that may potentially be affected by the rule." The federalism officers of the various agencies and departments must "identify each proposed, interim final, and final rule having a federalism impact" and prepare an assessment that the relevant "agency head must consider" in "all decisions" involved in "promulgating, implementing, and interpreting" the rule.

This language applies to each and every rule at all stages of development. According to GAO experts, this broad brush would cover about 7,820 rules, in contrast to the Unfunded Mandates Reform Act, which targeted the 30-50 "economically significant" rules that agencies produce annually.[10] In EPA's case, this additional workload could well prove the straw that breaks the already sagging camel's back. The Agency is now functioning with a budget that is a mere 15

[10] Rules are sorted into five different categories: (1) economically significant; (2) significant; (3) substantive; (4) administrative; and (5) routine/frequent. The last category – routine/frequent – covers approximately 5,291 rules annually at all stages of development. For further information, contact Curtis Copeland, Assistant Director, Federal Management Issues, GAO at (202) 512-8101.

percent higher, in real dollars, than it was in 1985, before the passage of a dozen major new laws, including the 1990 Clean Air Act Amendments.

Moreover, it is unclear how agencies and departments are to find each and every state and local government elected official who is "potentially" affected by a rule. In essence, the legislation would shift the responsibility for identifying such interests from the large network of public interest groups that currently represent such officials to the agency. Would "consulting" with the staff of the National League of Cities be adequate? Or could a handful of local officials in any of the cities that are not members of the League stop a rule because the League staff failed to adequately represent their interests? How would this outcome be any more democratic than the worst offenses of the current system?

Could state and local politicians who are disgruntled with the results of a rulemaking challenge it on the basis that the EPA Administrator or her counterparts did not explicitly consider each and every aspect of their concerns, no matter how frivolous, in each and every aspect of decision making with respect to a rule? Worse, will the prospect of such litigation drive agency heads to give state and local politicians virtual veto power over all aspects of any rule that concerns them, skewing the appropriate balance of power and allowing highly localized concerns to control national policy?

Last but not least, it is worth noting that the legislation as drafted defines "public official" to include only elected officials, in effect rendering irrelevant the burgeoning numbers of organizations that represent career state and local officials who not only have the expertise to offer agencies like EPA good advice, but will have the responsibility for implementing the programs at the local level.

Some of you may know Professor Thomas McGarity, whose work on the administrative process is always brilliant and timely. A few years ago, he wrote an article decrying the "ossification" of the rulemaking process, by which he meant the gridlock that increasingly afflicts the daily performance of every federal regulatory agency in existence.[11] Ironically, the same state and local officials who demand that you pass legislation like the bill before you are justifiably outraged that EPA has not moved more quickly to reform its own rules, to repeal unnecessary requirements, and to reinvent the way it does business. To state and local officials who have these concerns, but nevertheless believe something like the Federalism Accountability Act of 1999 is warranted, I say, "Be careful what you wish for." It is hard to imagine that ossification could get worse, but in the hands of a timid or uncertain bureaucracy, or as a result of a few misguided court decisions, I think this law could make prior ossification look like regulatory activism.

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[11] Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385, 1429-36 (1992).

Because it will inevitably be left to the courts to resolve all these issues, I thought it would be appropriate to close with a quote from one of our wisest jurists in this area. In a speech delivered to the 26th Annual ALI-ABA Environmental Law Course of Study in 1996, the Honorable Patricia Wald, Chief Judge of the D.C. Circuit Court of Appeals where most of these decisions would be made, had some solemn words of warning regarding congressional efforts to enact generic procedural requirements rather than statute-specific substantive reforms. Judge Wald was addressing requirements that analytical requirements similar to those in S. 2124, except that they dealt with the costs and benefits of regulation, as opposed to its impact on federalism. She said:

> I believe that the existence of these [analytical] requirements as statutory mandates would almost certainly generate a quantitatively and eventually a qualitatively different kind of judicial review . . . They would almost inevitably produce more of a checklist mentality on the part of reviewing courts; we judges would more often play the role of insuring that all these varied statutory tasks are performed to specifications, in contrast to the essentially diffuse role we now play as an ultimate safety valve to insure that bizarre things don't happen at the agency level. . . .
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> Minimally, rulemaking records would be longer, rules would take longer to issue, courts would have to read and check for more statutorily required analyses, court decisions might as a result themselves be slower to issue. It's hard to say whether more rules would be thrown out by courts, but I do suggest that the more facts and findings the agency has to put in the record, the more likely it is that a meticulous judge or advocate may find something in there that is inconsistent with something else and raise a plausible question of whether 'reasoned decision making' has taken place. That, of course, may be what Congress wants and if so, it is our job on the courts to give it to them. But it deserves thinking about by everyone in the process. . . .
>
> Thank you for your consideration of these views.

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July 14, 1999

The Honorable Fred Thompson
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the North American Securities Administrators Association, Inc. (NASAA), I applaud your leadership and the work of the Governmental Affairs Committee to strengthen the federalism partnership among federal, state and local governments. This partnership has resulted in passage of legislation to discourage unfunded mandates, new block grants in welfare and other programs, and legislation that seeks to curtail federal micro-management. These are historic accomplishments, and we are pleased to offer our support for the next important step in sustaining this partnership, The Federalism Accountability Act of 1999.

NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, and Puerto Rico. In recent years we have worked closely with Congress to reduce the state preemptive effects of provisions included in the National Securities Markets Improvement Act of 1996 and most recently, the Financial Services Act of 1999.

State regulators are charged with ensuring efficient regulation that protects investors and maintains safe securities markets for all customers. Through front-end licensing and registration activities, state agencies work to spot and stop fraud and abusive sales practices--before investors suffer the consequences. In essence, state securities regulation provides a "safety net" for investors.

NASAA and other organizations like the National Association of Secretaries of State are alarmed that proposed federal legislation could seriously undermine the ability of state regulators to protect their citizens. Specifically, state governments could lose vital powers if proposals by the Securities Industry Association to the Senate Banking Committee are adopted as part of the yet-to-be-introduced Securities Market Enhancement Act of 1999. Those proposals raise serious investor protection concerns for state regulators at a time when record numbers

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of Americans are investing in the stock market to secure their financial goals. They also stand in sharp contrast to your Committee's stated goal of reducing the occurrence of federal preemption. Attached is a summary of NASAA's concerns regarding the SIA proposals.

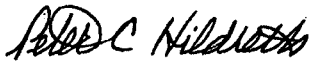
As you know, Utah Governor Mike Leavitt testified earlier this year before your Committee. He stated at that time:

> **The important role of state laws and regulatory responsibilities should not be forgotten in the midst of the scramble to accommodate businesses and the forces of globalization, technology, and deregulation. States and their citizens stand to benefit as much as businesses from these changes, but not at the cost of continuing federal preemption of state laws.**

NASAA agrees with Governor Leavitt's statement. Federal preemption of state legislative and executive authority not only violates the fundamental principles of federalism, but in the case of the SIA proposal it has the potential of putting the economic security of potentially millions of Americans at risk.

Mr. Chairman, NASAA shares your concern regarding the frequency and pace of recent federal preemption of state laws as well as the no-action letters and interpretive releases issued by federal regulatory agencies that result in similar preemption. In that regard, we endorse The Federalism Accountability Act of 1999, and stand ready to assist you and your colleagues in any way to ensure its passage. Please don't hesitate to call me at (603) 271-1463 or Deborah Fischione, NASAA's Director of Policy at (202) 737-0900 if we may be of further assistance as S. 1214 moves through the legislative process.

Sincerely,



Peter C. Hildreth
Director of Securities, State of New Hampshire
President, North American Securities Administrators Association

Attachment



NASAA

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WILL STATES LOSE THEIR AUTHORITY TO PROTECT INVESTORS?

State governments could lose vital powers to protect their citizens as a result of a proposal now being considered by a key congressional committee. The Senate Banking Committee is currently evaluating proposals from various groups for possible inclusion in the draft of the Securities Markets Enhancement Act of 1999 ("SMEA"). The Committee has received proposals from the Securities Industry Association ("SIA") that raise serious investor protection concerns for state regulators at a time when record numbers of Americans are investing in the stock market to secure their financial goals. We are now a nation of stockholders: according to the Securities and Exchange Commission ("SEC"), one in three Americans is invested in the stock market compared to just one in 18 in 1980.

State securities regulators are part of a complementary regulatory system of local, industry and national securities oversight that makes the US stock markets the fairest and most transparent in the world. State regulators have worked to create an improved regulatory landscape, both in the wake of the National Securities Markets Improvement Act of 1996 ("NSMIA") and generally in reaction to the evolution of the American financial marketplace. The states work closely with the SEC and industry self-regulatory organizations to protect individual investors and promote fair markets.

The SIA proposals, if enacted, would dismantle or undermine the ability of states to protect investors from harm. If the proposals became law:

- **States would be unable to keep out bad brokers.** States would lose their authority to license out-of-state stockbrokers doing business within their borders. They could only license those brokers who have a place of business in their state. In most states, 90 percent of stockbrokers doing business in the state have their place of business in another state. States would no longer be able to screen out brokers with disciplinary histories (suspensions, arbitrations, injunctions, fines, etc.) from selling securities to Main Street investors within their borders.

- **States would be powerless to regulate investment advisers, one of the fastest growing segments of the financial services industry.** Under the SIA proposal, states could not impose their own licensing qualifications on individual financial planners greater than those imposed by the SEC. The SEC, however, has virtually no regulatory structure in place for planners who work for investment adviser firms. Congress allocated regulatory power over these individuals to the states in NSMIA. Thus the SIA seeks to reverse legislation enacted by Congress just three years ago.

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Executive Director: Philip A. Feigin
Ombudsman: Robert M. Fisher (Pennsylvania)

Enactment of the SIA proposal would likely result in the elimination of a new competency exam for investment adviser representatives, developed by state regulators with the support of the financial planning industry, scheduled for implementation by year's end.

- **States would lose vital enforcement authority**. State securities agencies would be precluded from seeking a financial penalty in an enforcement action against a stockbroker or firm where the SEC, the National Association of Securities Dealers ("NASD") or a stock exchange has already acted and imposed a financial penalty. This provision would tie the hands of a state securities regulator in cases where state securities laws have been broken and state residents harmed.

- **States would lose control of information they need to protect investors**. States would lose control of their public records. The NASD would be put in charge of deciding what background and disciplinary information about state licensed brokerage firms and stockbrokers would be collected and disclosed to the public. Currently, state securities regulators have a major role in determining what license information is collected, and given state freedom of information laws, they disclose to investors more background information about stockbrokers than the NASD does, enabling investors to make better-informed decisions.

In summary, state securities regulators support well thought-out reforms that will make our markets and regulation more efficient--but not at the expense of investor protection. These proposals by the SIA are flawed and fundamentally anti-investor. Our nation's securities markets are well regulated and trusted by tens of millions of investors here and around the world. Radical and extreme proposals like these could undermine that trust and are not in the long-term interest of investors or the securities industry.

State securities regulators are represented in Washington, DC by the North American Securities Administrators Association ("NASAA"). Please contact Deborah Fischione, NASAA's Director of Policy at 202-737-0900 if you need additional information.

United States General Accounting Office

GAO

Testimony

Before the Committee on Governmental Affairs
U.S. Senate

Not to be Released
Before 3:00 p.m. EDT
Wednesday
July 14, 1999

FEDERALISM

Comments on S. 1214--The Federalism Accountability Act of 1999

Statement for the Record of L. Nye Stevens
Director, Federal Management and Workforce Issues
General Government Division





GAO/T-GGD-99-143

Statement

Federalism: Comments on S. 1214–The Federalism Accountability Act of 1999

Mr. Chairman and Members of the Committee:

We welcome this opportunity to comment on S. 1214, the "Federalism Accountability Act of 1999." The bill addresses a number of issues affecting intergovernmental relations, including rules of construction regarding preemption, legislative requirements, agency rulemaking requirements, and performance measures for state-administered federal grant programs. My comments are directed to the agency rulemaking and performance measurement requirements.

I will focus most of my comments on two previous executive and legislative branch initiatives that, like section 7 of the bill, were designed to highlight the impact of federal rules on state and local governments. Our past work showed the limited effect of those previous initiatives during the period of our review, which suggests a need for this section of the proposed legislation. I will also point out a few similarities and differences between the bill and the executive order. Finally, I will briefly comment on the experience of one agency in cooperatively setting the type of goals and performance measures with states in a federal grant program that are contemplated in section 8 of the bill.

Executive Order and UMRA Had Little Effect on Agencies' Rulemaking Actions

During the past 20 years, state, local, and tribal governments as well as businesses have expressed concerns about congressional and regulatory preemption of traditionally nonfederal functions and the costs of complying with federal regulations. The executive and the legislative branch have each attempted to respond to these concerns by issuing executive orders and enacting statutes requiring rulemaking agencies to take certain actions when they issue regulations with federalism or intergovernmental relations effects. Two prime examples of these responses are Executive Order 12612 ("Federalism") and the Unfunded Mandates Reform Act of 1995 (UMRA).

Few Federalism Assessments Prepared Under Executive Order 12612 Between April 1996 and December 1998

Executive Order 12612, issued by President Reagan in 1987, established a set of fundamental principles and criteria for executive departments and agencies to use when formulating and implementing policies that have federalism implications. The executive order says that federal agencies should refrain from establishing uniform, national standards for programs with federalism implications, and when national standards are required, they should consult with appropriate officials and organizations representing the states in developing those standards. The order says that regulations and other policies have federalism implications if they "have substantial direct effects on the States, on the relationship between the

national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Executive Order 12612 also contains specific requirements for agencies. For example, the order requires the head of each agency to designate an official to be responsible for ensuring the implementation of the order. That official is required to determine which proposed policies have sufficient federalism implications to warrant preparation of a "federalism assessment." The assessment must contain certain elements (e.g., identify the extent to which the policy imposes additional costs or burdens on the states) and must accompany any proposed or final rule submitted to the Office of Management and Budget (OMB) for review under Executive Order 12866.[1] OMB, in turn, is required to ensure that agencies' rulemaking actions are consistent with the policies, criteria, and requirements in the federalism executive order.

In May 1998, President Clinton issued Executive Order 13083 ("Federalism"), which was intended to replace both Executive Order 12612 and Executive Order 12875 ("Enhancing the Intergovernmental Partnership").[2] However, in August 1998, President Clinton suspended Executive Order 13083 in response to concerns raised by state and local government representatives and others about both the content of the order and the nonconsultative manner in which it was developed. Therefore, Executive Order 12612 remains in effect.

To determine how Executive Order 12612 had been implemented in recent years, we reviewed (1) how often the preambles to covered agencies' final rules issued between April 1, 1996, and December 31, 1998, mentioned the executive order and how often they indicated the agencies had conducted federalism assessments under the order;[3] (2) what selected agencies have done to implement the requirements of the order; and (3) what OMB has

[1]Executive Order 12612 actually refers to rulemaking procedures under Executive Order 12291, which was revoked and replaced by Executive Order 12866 in 1993. Because only "significant" rules are submitted to OMB for review under Executive Order 12866, federalism assessments for nonsignificant rules are not required to be submitted to OMB. For a description of the review process under this order, see Regulatory Reform: Implementation of the Regulatory Review Executive Order (GAO/T-96-185, Sept. 25, 1996).

[2]Executive Order 12875, among other things, requires federal agencies to "develop an effective process to permit elected officials of state, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

[3]It is unclear whether Executive Order 12612 covers regulations and other policies issued by independent regulatory agencies, such as the Federal Communications Commission and the Securities and Exchange Commission. Therefore, we focused our review on executive departments and agencies that are not independent regulatory agencies.

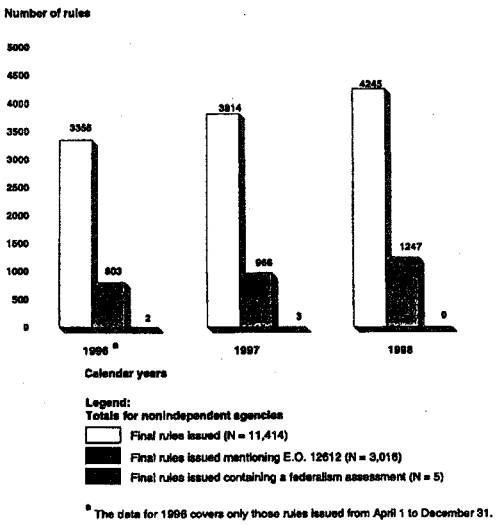
done to oversee federal agencies' implementation of the order in the rulemaking process.[4] We focused on the April 1996 through December 1998 time frame because we were able to use our database to identify which rules were "major" under the Small Business Regulatory Enforcement Fairness Act (SBREFA) (e.g., those that have a $100-million impact on the economy). As a result, we cannot comment on rules issued outside of that time frame. Although Executive Order 12612 does not require agencies to mention the order in the preamble to their final rules or to note in those preambles whether a federalism assessment was prepared, doing so is a clear indication that the agency was aware of and considered the order's requirements. Also, if an agency prepared a federalism assessment for a final rule, it would be logical for the agency to describe the assessment in the preamble to the rule.

Agencies Prepared Few Federalism Assessments During Review Timeframe

Our work showed that Executive Order 12612 had relatively little visible effect on federal agencies' rulemaking actions during this time frame. To summarize the nearly 3 years of data depicted in figure 1, agencies covered by the order mentioned it in the preambles to about 26 percent of the 11,414 final rules they issued between April 1996 and December 1998.

[4] Federalism: Implementation of Executive Order 12612 in the Rulemaking Process (GAO/T-GGD-99-93, May 5, 1999).

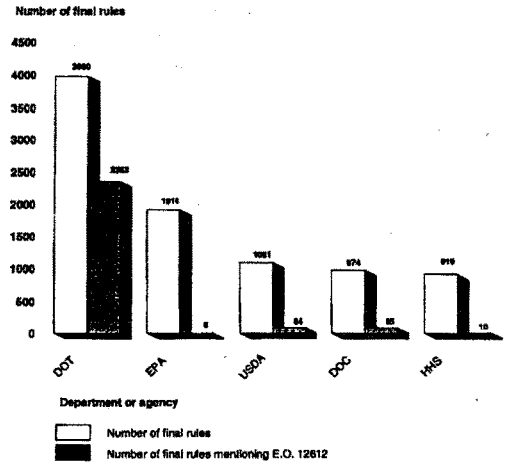
Figure 1: Agencies Indicated Only Five Final Rules Issued Between April 1996 and December 1998 Had Federalism Assessments



Note: The data for 1996 covers only those rules issued from April 1 to December 31.
Source: Federal Register and GAO analysis.

Five agencies issued the bulk of the final rules published during this period—the Departments of Agriculture (USDA), Commerce (DOC), Health and Human Services (HHS), and Transportation (DOT); and the Environmental Protection Agency (EPA). As figure 2 shows, these agencies varied substantially in the degree to which they mentioned the executive order. For example, DOT mentioned the order in nearly 60 percent of its nearly 4,000 final rules, whereas EPA did not mention the order in any of the more than 1,900 rules it issued.

Figure 2: Agencies Differed in Degree to Which They Mentioned Executive Order 12612 in Final Rules Issued Between April 1996 and December 1998



Source: Federal Register and GAO analysis.

However, mentioning the order in the preamble to a rule does not mean the agency took any substantive action. The agencies usually just stated that no federalism assessment was conducted because the rules did not have federalism implications. Nearly all of these statements were standard, "boilerplate" certifications with little or no discussion of why the rule did not trigger the executive order's requirements.

In fact, the preambles to only 5 of the 11,414 final rules that the agencies issued between April 1996 and December 1998 indicated that a federalism assessment had been done—2 in 1996 and 3 in 1997. Those five rules are listed in table 1.

Table 1: Preambles Indicated Four Agencies Issued Five Final Rules With Federalism Assessments Between April 1996 and December 1998

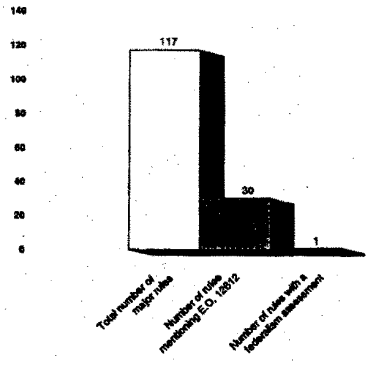
Department or agency	Date final rule was published	Title
Department of Health and Human Services	Aug. 28, 1996	Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents
Department of Transportation	Dec. 16, 1996	Roadway Worker Protection
Department of Commerce	Jan. 30, 1997	Florida Keys National Marine Sanctuary
	Mar. 28, 1997	Hawaiian Islands Humpback Whale National Marine Sanctuary
Department of Labor	Mar. 31, 1997	(Hazard) Abatement Verification

Source: Federal Register and GAO analysis.

Many of the final rules that federal agencies issue are administrative or routine in nature, and therefore unlikely to have significant federalism implications. As a result, it is not particularly surprising that agencies would not prepare federalism assessments for many of those rules. However, rules that are "major" under SBREFA and that involve or affect state and local governments would seem more likely to have federalism implications that would warrant preparation of an assessment.

However, that does not appear to have been the case. As figure 3 shows, of the 117 major final rules issued by covered agencies between April 1996 and December 1998, the preambles indicated that only 1 had a federalism assessment. The agencies had previously indicated that 37 of these rules would affect state and local governments, and the preambles to 21 of the rules indicated that they would preempt state and local laws in the event of a conflict. At least one of the four state and local government organizations that we consulted during the review said that federal agencies should have done assessments for most of these 117 major rules. In response, the agencies said that their rules did not have sufficient federalism implications to trigger the executive order's requirements.

Figure 3: Only One Major Rule Issued Between April 1996 and December 1998 Had A Federalism Assessment



Sources: Federal Register and GAO's major rule database.

EPA Established High Threshold for Federalism Assessments

All three of the agencies we visited during our review (USDA, HHS, and EPA) had some kind of written guidance on the executive order and had designated an official or office responsible for ensuring its implementation.[1] However, the criteria the agencies used to determine whether federalism assessments were needed varied among the agencies. USDA's guidance did not establish any specific criteria, with agency attorneys making their own determinations regarding federalism implications in the context of each rulemaking. HHS' guidance listed four threshold criteria that could be used to determine whether a federalism assessment was required, but said an assessment must be prepared if an action would directly create significant effects on states even if the action was mandated by law or the department otherwise had no discretion.

[1]The agencies that we visited were those with the most major rules that state and local government representatives believed should have had a federalism assessment.

The criteria in EPA's guidance established a high threshold for what constitutes "sufficient" federalism implications—perhaps explaining why none of the agency's more than 1,900 final rules issued during the April 1996 to December 1998 time frame had a federalism assessment. For example, in order for an EPA rule to require an assessment, the agency's guidance said the rule must meet all four of the following criteria:

- have an "institutional" effect on the states, not just a financial effect (regardless of magnitude);
- change significantly the relative roles of federal and state governments in a particular program context, lead to federal control over traditional state responsibilities, or decrease the ability of states to make policy decisions with respect to their own functions;
- affect all or most of the states; and
- have a direct, causal effect on the states (i.e., not a side effect).

At least one of these criteria appeared to go beyond the executive order on which it is based. Although EPA said a rule must affect all or most of the states in order to have sufficient federalism implications to warrant preparation of an assessment, Executive Order 12612 defines "state" to "refer to the States of the United States of America, individually or collectively." (Emphasis added.) EPA's guidance also said that, even if all four of these criteria are met, a rule would not require a federalism assessment if a statute mandates the action or the means to carry it out are implied by statute. However, EPA's actions appear to be allowable because the executive order does not define what is meant by "sufficient" federalism implications, leaving that determination up to the agencies.

OMB Has Taken Little Recent Action to Ensure Implementation of Executive Order 12612

OMB officials told us that they had taken little specific action to ensure implementation of the executive order, but said the order is considered along with other requirements as part of the regulatory review process under Executive Order 12866. They said that agencies had rarely submitted separate federalism assessments to OMB but have addressed federalism considerations, when appropriate, as a part of the cost-benefit analysis and other analytical requirements.

Commenting on the results of our review, the Acting Administrator of OMB's Office of Information and Regulatory Affairs said it was not surprising that agencies were not focused on implementing Executive Order 12612 during the covered time period because they knew that the order was soon to be revised by Executive Order 13083. However, he also said that Executive Order 12612 had not been implemented to any significant extent by the Reagan Administration "or its successors,"

suggesting that the lack of implementation was unrelated to any pending revision of the order. In addition, the Acting Administrator said that the primary vehicles for improving federal-state consultation in the past 6 years have been Executive Order 12875 and UMRA. We have not examined the implementation of Executive Order 12875. However, we have examined the implementation of UMRA, and concluded that it has had little effect on agencies' rulemaking activities.

UMRA Had Little Effect on Agency Rulemaking

Title II of UMRA is one of Congress' primary efforts to address the effects of federal agencies' rules on state and local governments. Section 202 of the act generally requires federal agencies (other than independent regulatory agencies) to prepare "written statements" containing specific information for any rule for which a notice of proposed rulemaking was published that includes a federal mandate that may result in the expenditure of $100 million or more in any 1 year by state, local, and tribal governments, in the aggregate, or the private sector. UMRA defines a "mandate" to be an "enforceable duty" that is not a condition of federal assistance and does not arise from participation in a voluntary federal program. For rules requiring a written statement, section 205 requires agencies to consider a number of regulatory alternatives and select the one that is the least costly, most cost-effective, or least burdensome and that achieves the purpose of the rule. Other sections of the act focus even more specifically on the interests of state and local representatives. For example, section 203 states that agencies must develop plans to involve small governments in the development of regulatory proposals that have a significant or unique effect on those entities. Section 204 requires agencies to develop processes to consult with representatives of state, local, and tribal governments in the development of regulatory proposals containing "significant [f]ederal intergovernmental mandates."

Last year, we reported that these and other requirements in title II of UMRA appeared to have had only limited direct impact on agencies' rulemaking actions in the first 2 years of the act's implementation.[6] Most of the economically significant rules promulgated during UMRA's first 2 years were not subject to the written statement requirements of title II. Some did not have an associated notice of proposed rulemaking that triggered the act's requirements. Many did not impose an enforceable duty other than as a condition of federal financial assistance or as a duty arising from participation in a voluntary program. Other rules did not result in "expenditures" of $100 million. Because no written statement was required

[6]Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions (GAO/GGD-98-30, Feb. 4, 1998).

for these rules, the requirements in section 205 regarding the identification and selection of regulatory alternatives were not applicable to these rules. Also, title II of UMRA contains exemptions that allowed agencies not to take certain actions if they determined the actions were duplicative or not "reasonably feasible."

Other provisions in title II also had little effect. During the first 2 years of UMRA's implementation, the requirement in section 204 that agencies develop an intergovernmental consultation process appears to have applied to no more than four EPA rules and no rules from other agencies. EPA generally used a consultation process that was in place before UMRA was enacted. Also, section 203 small government plans were not developed for any of the 73 final rules promulgated during this 2-year period. Officials in the four agencies that we contacted said none of their final rules had a significant or unique effect on small governments.

Section 208 of UMRA requires the Director of OMB to submit an annual report to Congress on agency compliance with UMRA. The fourth such report is scheduled to be delivered within the next few weeks. In his third UMRA report published in June 1998, the OMB Director noted that federal agencies had identified only three rules in the more than 3 years since the act was passed that affected the public sector enough to trigger the written statement requirements. Nevertheless, he said federal agencies had embraced the act's "overall philosophy," as evidenced by the range of consultative activities the report described.

Federalism Act Similar to But Different From Executive Order

Section 7 of S. 1214 contains several provisions that are similar to the requirements in Executive Order 12612. For example, the bill would, if enacted, require the head of each agency to designate a "federalism officer" with responsibilities similar to the "designated official" in the executive order. Both the bill and the order require this individual to determine whether proposed or final rules have sufficient federalism implications to warrant preparation of an assessment. The content of the assessments required in the bill and the order are also similar. For example, both assessments require agencies to determine the extent to which a proposed or final rule affects traditional state authority. Whereas the executive order says the assessments should identify the extent to which a rule imposes "additional costs or burdens" on the states, the bill says the assessments should describe "significant impacts" on state and local governments—which logically would include (but not be limited to) costs or burdens. Finally, neither the bill nor the executive order require agencies to declare whether their proposed or final rules have federalism implications. In contrast, the Regulatory Flexibility Act of 1980 requires

agencies to state whether or not their rules have a "significant economic impact on a substantial number of small entities."[7]

S. 1214 is also different from the executive order in some respects. For example, unlike the order, the bill requires agencies to notify and consult with officials in governments potentially affected by the rule before issuing a notice of proposed rulemaking.[8] The bill also requires pre-publication consultation when agencies do not issue notices of proposed rulemaking. This is important because, as we reported last year, about half of all final rules are published without a proposed rule.[9] Another requirement not found in the order is that agencies publish a summary of any federalism assessment when the rule is published in the Federal Register. Doing so would clearly delineate when the designated officer believes a rule has federalism implications.[10] Under the executive order, agencies do not have to publish the results of their federalism assessments.

S. 1214 also differs from Executive Order 12612 in that it more clearly defines the type of rulemaking actions that should trigger the preparation of a federalism assessment. Under the executive order, the designated official has broad discretion to determine whether a rule has "sufficient" federalism implications to warrant the preparation of an assessment. Some designated officials have used that discretion to conclude that preemption of state and local authority does not, in itself, constitute sufficient federalism implications.

As I noted previously, the agencies indicated in 21 of the major rules without a federalism assessment that the rules would take precedence in the event they conflicted with state or local laws or regulations. One of the

[7]However, the Small Business Administration's Office of Advocacy reports that some agencies have used "boilerplate" certifications indicating that their rules do not have a significant impact. Contributing to this problem is the fact that the Regulatory Flexibility Act does not define key terms, resulting in different agencies having different interpretations. See Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments (GAO/HRD-91-16, Jan. 11, 1991).

[8]Executive Order 12866 says "[w]herever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities." Also, Executive Order 12875 requires agencies to develop an effective process to permit representatives of state, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.

[9]See Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules (GAO/GGD-99-126, Aug. 31, 1999).

[10]We have previously supported the use of executive summaries in regulatory economic analyses. See Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses (GAO/RCED-98-142, May 26, 1998).

rules was an HHS regulation on organ procurement and transplantation.[11] In the preamble to the rule, HHS noted that at least one state had passed a law that limited organ-sharing policies, and that such limitations were in conflict with a national organ-sharing system based on medical need. Therefore, the agency added a section to the regulatory text stating that "[n]o state or local governing entity shall establish or continue in effect any law, rule, regulation, or other requirement that would restrict" compliance with the regulations. However, on the same page in the Federal Register preamble as its preemption discussion, HHS said "[w]e have determined that this rule will not have consequential effects on States, local governments, or tribal governments."

S. 1214 appears to require agencies to prepare a federalism assessment if they determine that their rules will have a preemptive effect on state and local governments. Subsection 7(b) of the bill requires the previously-mentioned consultation process with state and local officials "for the purpose of identifying any preemption of State or local government authority or other significant federalism impacts that may result from the rule." Subsection 7(c) says that the federalism officer "shall identify each proposed, interim final, and final rule having a federalism impact, including each rule with a federalism impact identified under subsection (b), that warrants the preparation of a federalism assessment." (Emphasis added.)

However, it is less clear what other "federalism impacts" might trigger a federalism assessment. For example, if an agency proposes a rule that has a sizable financial impact on state or local governments, the agency's federalism officer may determine that those financial impacts alone do not require an assessment. Therefore, the drafters of S. 1214 may want to consider clarifying in the bill what is meant by a "federalism impact."

Consultation Enhances Intergovernmental Partnership

Finally, I would like to briefly comment on section 8 of S. 1214, which says that federal agencies may not include any agency activity that is a state-administered federal grant program in its annual performance plans developed pursuant to the Government Performance and Results Act of 1993 (Results Act) "unless the performance measures for the activity are determined in cooperation with public officials." The bill defines "public officials" as elected officials of state and local governments, including certain organizations that represent those officials (e.g., the National Governors' Association and the United States Conference of Mayors).

[11]See 63 FR 16296, April 2, 1998.

The Results Act already requires agencies developing their strategic plans to "solicit and consider the views and suggestions of those entities potentially affected by or interested in the plan." The Senate Governmental Affairs Committee report on the Results Act noted that the strategic plan "is intended to be the principal means for obtaining and reflecting, as appropriate, the views of Congress and those governmental and nongovernmental entities potentially affected by or interested in the agencies' activities."

In that regard, we believe that working with state and local governments or their representative organizations to develop goals and performance measures in federal grant-in-aid programs can strengthen the intergovernmental partnerships embodied in those programs. For example, in 1996, we reported on a joint goal and performance measure-setting effort between the federal Office of Child Support Enforcement (OCSE) and state governments.[12] Initially, the federal-state relationship was not so cooperative. In 1994, OCSE specified the performance levels that states were expected to achieve in such areas as the establishment of paternity and collections of child support. State program officials strongly objected to this federal mandate because they did not have an opportunity to participate in the planning process.

Following these initial planning efforts, OCSE sought to obtain wider participation from program officials at the federal, state, and local government levels. OCSE also established task forces consisting of federal, state, and local officials to help focus management of the program on long-term goals. During the planning process, participants agreed that the national goals and objectives would be based on the collective suggestions of the states and that the plan's final approval would be reached through a consensus. For each goal, the participants identified interim objectives that, if achieved, would represent progress toward the stated goal. At the time of our review, OCSE and the states were also developing performance measures to identify progress toward the goals, and planned to develop performance standards to judge the quality of state performance. They created a Performance Measures Work Group to develop statistical measures for assessing state progress toward achieving national goals and objectives. OCSE also encouraged its regional staff to develop performance agreements with states, specifying both general working relationships between OCSE regional offices and state program officials and performance goals for each state.

[12]Child Support Enforcement: Reorienting Management Toward Achieving Better Program Results (GAO/HEHS/GGD-97-14, Oct. 25, 1996).

Overall, OCSE and most state officials that we contacted said the joint planning process strengthened the federal/state partnership by enabling them to help shape the national program's long-term goals and objectives. State and local government stakeholder involvement has also been important in the development of practical and broadly accepted performance measures in other federal programs, including some block grants.[13] We believe that these kinds of intergovernmental cooperation can serve as models for the kinds of efforts that section 8 of the Federalism Accountability Act of 1999 seeks to encourage.

Contacts and Acknowledgment

For future contacts regarding this testimony, please contact L. Nye Stevens or Curtis Copeland at (202) 512-8676. Individuals making key contributions to this testimony included Elizabeth Powell, Joseph Santiago, Alan Belkin, and V. Bruce Goddard.

[13]Managing for Results: Measuring Program Results That Are Under Limited Federal Control (GAO/GGD-99-16, Dec. 11, 1998); Grant Programs: Design Features Shape Flexibility, Accountability, and Performance Information (GAO/GGD-98-137, June 22, 1998).

TESTIMONY OF JOHN S. BAKER, JR., DALE E. BENNETT PROFESSOR OF LAW LOUISIANA STATE UNIVERSITY LAW CENTER

BEFORE THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS ON THE FEDERALISM ACCOUNTABILITY ACT OF 1999 (S. 1214)

JULY 14, 1999

Mr. Chairman and Members of the Committee: I am grateful for the opportunity to provide written testimony about The Federalism Accountability Act of 1999, S. 1214.

First of all, I would like to say something about federalism in the context of criminal law as a follow-up to my May 6th testimony before this committee at its hearing on the federalization of crime. Although S. 1214 currently contains no provisions related to criminal law, I know committee members are interested in the negative impact of federal criminal law on state authority. This committee has already reviewed *The Federalization of Crime* Task Force Report from the American Bar Association's Criminal Justice Committee, and received suggestions about federalism restrictions on criminal law at the May 6th hearing. Therefore, some provision related to criminal law might be added to this bill during the legislative process.

Although it did not appear in my previous written statement, at the May 6 hearings I did propose that Congress legislatively require in federal prosecutions encroaching on state criminal law, that the Government be made to establish to the district court the constitutionality of its claimed jurisdiction. This proposal was based on a brief observation in *U.S. v. Lopez*[1] that the Government should have the burden of proving, based on the facts of each particular case, that its prosecution falls within constitutional bounds.[2]

I believe requiring justification by the Government prior to impinging on traditional State criminal jurisdiction would be a more effective limit on federal

criminal law than certain other proposed reforms. I realize that the proposal I put forward, however, requires further study and debate in order to craft the appropriate legislative language. Rather than acting too hastily on this or other suggestions which have been made, the committee might consider creating its own advisory group or committee to suggest possible legislation based on the ABA Task Force Report.

Federalism clearly needs support: it is "down, but not out." In the legal academy, it is generally viewed, at best, as an antiquarian relic and, more commonly, as an intolerable obstruction to centralized, uniform, and (supposedly, therefore) rational policy-making. Federalism gets a better reception in the federal courts, as reflected by the Supreme Court's recent decisions on state sovereign immunity and the Eleventh Amendment,[3] but its influence over the jurisprudence of federal-state relations is tenuous at best. Until President Clinton attempted to revoke President Reagan's Federalism Executive Order,[4] the Executive Branch was more "federalism friendly" than it otherwise would be, given the natural bureaucratic bent toward planning and control. In recent years, the Congress has demonstrated considerable inconsistency towards federalism; some members have touted it, while at the same time attempting to nationalize whole new areas of law (national tort reform, for example). The States have been inconsistent as well; some state officials have opposed certain regulations on federalism grounds, while at the same time lobbying for new federal programs which necessarily increase federal control at the expense of state autonomy.

For federalism to exist as more than an historical memory or empty campaign rhetoric, the principle needs to be more than a mere preference; it must be made a matter of practical necessity. That is what S. 1214 proposes to accomplish. By focusing on the problem of preemption as it does, this bill pushes federalism to the fore, where procedurally it will be difficult to ignore.

A certain amount of theoretical background is useful in order to understand the need for legislation that actually enforces day-to-day respect for the principle of federalism. The Constitution's drafters believed that the protection of liberty required a structuring of power so that "Ambition [would] be made to counteract ambition." *Federalist 51*.[5] They described what they created (what we today call "federalism) as "in strictness, neither a national nor a federal Constitution." *Federalist 39*.[6] In this "compound republic of America," Madison said "[t]he different governments will control each other, at the same time that each will be controlled by itself." *Federalist 51*.[7]

Today, after decades of judicially-sanctioned expansion of federal power through the Commerce and Spending Clauses, the notion that the States control the federal government seems archaic. As developed below, the States are unable to do so, not merely as a result of the Commerce Clause jurisprudence, but because of 1)

the Supreme Court's development of the preemption doctrine and 2) the unanticipated impact of the Seventeenth Amendment on the relationship between the States and the Federal Government.

I. THE PREEMPTION DOCTRINE

The preemption doctrine is a gloss on the text of the Constitution. That is to say, the Constitution contains no preemption clause as such. Rather, it contains the Supremacy Clause which provides that the Constitution, federal statutes passed pursuant to it, and treaties, are the Supreme Law binding judges in every state, "the Constitution or laws of any state to the contrary notwithstanding." Art. VI, Cl. 2. On its face, the Supremacy Clause only displaces state law to the extent that it conflicts with federal law.

The Marshall Court set the foundation for federal-state relations in its great Supremacy Clause cases, most notably *Martin v. Hunter's Lessee*,[8] *Gibbons v. Ogden*,[9] and *McCulloch v. Maryland*.[10] These cases involved federal statutes determined to be constitutional, which in each case conflicted with a state statute and/or court decision. Given a conflict between federal and state law, both could not prevail. The Supremacy Clause and, according to *Federalist 32*,[11] common sense, dictated that valid federal law must prevail.

Preemption eventually expanded well beyond the Marshall Court's Supremacy Clause jurisprudence. Under the modern preemption doctrine, state law may be defeated even when there is no direct conflict and even though Congress has not explicitly expressed its intent to preempt. It has been applied to situations in which a court determines that: 1) the federal law "occupies the field," *Hines v. Davidowitz*;[12] 2) federal law demonstrates the need for uniformity, *Jones v. Rath Packing Co*;[13] or that 3) state law *might* impede the federal law, *Pennsylvania v. Nelson*.[14]

When the Supreme Court invalidates state law in the absence of a direct conflict, it does so on the basis that *Congress intends* the preemption. Apart from wondering how it is that Congress can preempt state law if no direct conflict exists, one might suppose that if Congress intended to preempt, it would say so. If Congress routinely fails to state expressly its intent to preempt, the natural inference would seem to be that Congress has no such intent. If the federal courts were genuinely concerned about federalism, not to mention separation of powers, they would adopt rules requiring Congress to express clearly its intent to preempt, just as the Supreme Court requires an express statement for legislation to be retroactive.[15]

The Supreme Court does not, by its own admission,[16] have clear rules for interpreting the intent of Congress regarding preemption. Therefore, if Congress

wishes its intent to be clearly understood by the courts, the most sensible thing for it do is to create rules of construction. The only approach consistent with our federalism is something along the lines of the rules proposed in Section 6 of the Federalism Accountability Act of 1999. Under these provisions, no statute can preempt state law unless the "statute explicitly states that such preemption is intended." Agency accountability rules require not only an express statement, they cannot preempt state law without such preemption first being authorized by the controlling statute.

A. The Supremacy Clause Makes the Preemption Doctrine Unnecessary

The proposed rules of construction should be unnecessary given the Supremacy Clause. The Supremacy Clause has proven quite sufficient, without the preemption doctrine as an overlay, for the task of balancing concurrent and conflicting powers within our federal system. The basic premise of the Constitution is that unless otherwise clearly indicated, the powers of the federal government are concurrent with those of the states. As explained in *Federalist 32*, the federal government's jurisdiction is exclusive in only three kinds of situations.

> This exclusive delegation, or rather alienation, of State sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority.[17]

Given concurrent jurisdiction, conflicts between federal and state law are inevitable and not entirely avoidable. For that very reason, the Constitution includes the Supremacy Clause. Many conflicts are avoided in the course of the representative process. When direct conflicts do occur, however, the Supremacy Clause controls. Congress cannot discover every actual or potential conflict. Indeed, it would be impossible to do so. Some conflicts arise after passage of the federal legislation. Where, however, no direct conflict occurs, the preservation of the concurrent jurisdiction or powers of the States should require that the Supremacy Clause **not** be applied to block state laws. In other words, the so-called preemption doctrine should be contracted and made coequal with the Supremacy Clause. Stripping the preemption doctrine as a gloss on the Supremacy Clause would do much to

reinvigorate federalism.

Congress, of course, cannot dictate that the Supreme Court eliminate the doctrine of preemption. In practical effect, however, it could greatly contract the doctrine by adopting this legislation. Doing so would **not** amount to a "states' rights" policy crippling to the federal government. The Supremacy Clause, as here discussed, simply reflects the structure created by the Federalist Framers and enforced by the Marshall Court. It is a view once considered "nationalist," but which is the truly "federalist" position.

B. Limited Government

The Constitution has been rightly said to create a limited government with enumerated powers. Some think that limited government depends on the Tenth Amendment and that the Congress has only those powers *expressly* given to the Government. Such a view of the Constitution, which would have reconverted the governmental structure to a confederation, was rejected in drafting the Constitution. See *Federalist 33*.[18] It was also rejected in the drafting of the Tenth Amendment, as reflected in the Congressional debates on the Bill of Rights[19] and in *McCulloch v. Maryland*.[20] Appropriately, therefore, Finding Number 1 on the States' reserved powers does not include the word "expressly."

As was very evident in discussions in reaction to the Supreme Court's federalism decisions recently handed down, many people simply do not understand the federalism of the Framers. Many believe, either approvingly or disapprovingly, that what the Framers meant by "limited government" was a federal government which has all the powers of general government, but only insofar as granted by the states. They think that federalism is coequal with a "states' rights" view, dependent on reading the word "expressly" into the Tenth Amendment. Such a "states' rights" view is not the view of those who framed the Constitution, but of those who opposed it. The powers given to the federal government are limited in *number*, i.e., they are *enumerated*. As *Federalist 32*[21] explains and Chief Justice John Marshall repeats in both *Marbury v. Madison*[22] and *McCulloch*,[23] any power actually given to the federal government is not in itself limited.

The limits on power in the Constitution are generally structural, that is, relational. Through separation of powers, we know each branch checks the other through counterbalancing powers (e.g., the veto power). Each branch thus enforces limits on the others. This structure of separated and federal powers necessarily involves independence and dependence, power and limits on power. Each branch of the federal government is separated in order to insure its independence and checked in order to control its power. See *Federalist 47-51*.[24] The state and federal governments are also supposed to be independent of each other and set in opposition

to each other. Yet at the same time, the States were made a part of the federal government through their representation in the Senate. *Federalist 51*.[25]

No piece of legislation can make up for the power the States lost, as explained below, through adoption of the Seventeenth Amendment. Nevertheless, it would greatly assist the federalist cause and seem to reflect simple common sense to require that, if Congress intends to preempt state law, it should have to make a clear statement to that effect. Often, Congress states it has no such intention. What should it mean when Congress makes no such statement about its intention? If more members of the Supreme Court were solidly attuned to the federal nature of the Constitution, the Court would, in those circumstances, apply a presumption that Congress has no intention to preempt. Even though the Court has not done so, Congress can adopt the proposed rules of construction without doing any damage to the Supremacy Clause.

II. THE IMPACT OF THE SEVENTEENTH AMENDMENT: THE STATES LOST REPRESENTATION IN CONGRESS

Preemption would not be the problem it is if the states were still directly represented in this august body, as they were prior to the adoption of the Seventeenth Amendment. That change led directly to the expansion of the Commerce Clause. This is often missed in discussions about federalism, which usually center on the Commerce Clause versus the Tenth Amendment. In *Usery v. League of Cities*,[26] the Tenth Amendment made a brief come-back as a check on Congress' power under the Commerce Clause. Before long, however, it was reversed in *Garcia v. San Antonio Metropolitan Transit Authority*.[27] Then in *New York v. United States*[28] and *Printz v. United States*,[29] a majority of the Court recognized the protection of federalism rests on structural restraints of power. Indeed, in overturning *Usery*, the *Garcia* majority opinion noted that the passage of the Seventeenth Amendment providing for the direct election of senators greatly weakened federalism.[30] The adoption of the Seventeenth Amendment damaged federalism by changing the responsiveness of the Senate to the States. The direct connection between each Senator and his or her own state legislator had previously served as a major obstacle to the consolidation of national power.

In providing for the election of U.S. Senators directly by the voters of each state, the Seventeenth Amendment eliminated the voting role of the state legislatures. While the amendment increased the democratic character of the Senate, it decreased its federal character. See Federalist 39.[31] The Great Compromise, also known as the Connecticut Compromise, at the Constitutional Convention provided that, unlike the House of Representatives, the Senate represented the states as states -- a partial continuation of the principle of representation under the Articles of Confederation. Prior to the Seventeenth Amendment, senators more clearly represented the "states

as states" because they were elected by and responsible to state legislatures.[32] The Senate made the states a constituent part of the Congress. Senators who owed their election to state legislatures were naturally responsive to those legislatures. Having lost that control over their senators with direct, popular election, state governments were reduced almost to the level of another lobby at the national level. That situation necessitated the various associations representing state officials in the nation's capital.

As long as states were represented in the Senate, this body was not likely to adopt legislation which was opposed by even a significant minority of states. Unfunded mandates to the States would have been unthinkable. Not only would the Senate not initiate legislation lacking significant State support, this body stood as an effective barrier to House-passed legislation which in the view of even a minority of States, threatened **their** powers. Indeed, it was not until after ratification of the Seventeenth Amendment, most notably beginning during the New Deal, that Congress began to adopt legislation under the Commerce and Spending Clauses which propelled federal power and budgets at the expense of the States.

When, during the 1930's, Congress expanded federal power, it also created new administrative agencies. For Congress to pass all the new laws, it needed the kind of assistance that could only come from administrative bureaucracies. Increasingly, Congress "delegated" much power to the administrative agencies in the form of rule-making. The Supreme Court ultimately allowed agencies to preempt State law even though Congress has not clearly stated its intent that the agency be allowed to do so.[33]

This delegation of power to administrative agencies has greatly facilitated the consolidation of national power. It evades the constitutional separation of powers, which itself is a protection of federalism. Initially, such delegation of power was attacked constitutionally on the ground that Congress could not delegate its legislative powers. With two notable exceptions,[34] however, the Supreme Court has not invalidated congressional legislation on grounds of excessive delegation.[35] During the 1980's, such delegation was more specifically attacked directly in terms of separation of powers.

While delegating its work, Congress did not want to give up any real power. Thus, Congress invented the "legislative veto" as a way of retaining power to control policy made by Executive Branch agencies. After fifty years of such a practice, the Supreme Court declared legislative vetoes unconstitutional in *I.N.S. v. Chadha*.[36]

III. THE FEDERALISM ACCOUNTABILITY ACT AS A PARTIAL SOLUTION

The Federalism Accountability Act of 1999 cannot alter the most fundamental

shifts in power that have occurred to create the "administrative state." Nevertheless, it can and does respond to the three parts of the power puzzle: the Congress itself, the administrative agencies, and the courts. Simply adopting rules of construction that require an express congressional statement of preemption would not advance the cause of federalism if such statements became routine. Indeed, it could have the opposite effect of increasing the number of preemptive statutes. To avoid such an outcome, members of Congress in some way must have to confront the fact that by voting *for* a particular piece of legislation containing a preemptive clause, they are voting *against* state interests. If Congress, however thoughtlessly, expressly preempts state law, the courts should follow the stated intention – if the statute is otherwise constitutional.

In order to strengthen federalism, some mechanism must be in place to focus the attention of members of Congress on preemption when voting. If the preemption issue is not "red flagged," it is less likely to become a matter of debate. Section 5 of the bill attempts to address this issue. It requires either a committee or conference report or statement to provide "an explanation of the reasons for . . . preemption."

The language of Section 5 which addresses this matter of justification needs some clarification. In my view, the section should require a statement which, first of all, "describes the constitutional basis for the statute," (for instance the Commerce Clause) and then explains why it is "necessary and proper" to displace state law. If the Congress intends more than that State law give way when there is a direct conflict, then the impact on States of such a comprehensive federal program needs to be clearly understood. Congress, within limits, certainly has the power to pass broader legislation than it might have chosen -- see *McCulloch v. Maryland*[37] and *Federalist 32*.[38] Before doing so, however, its members ought to consider the constitutional implications and the impact on the States. Thus, I suggest the section should provide that the required statement 1) cite the specific enumerated power(s), e.g., the Commerce Clause, giving Congress power to pass the statute and 2) insofar as state law does not directly conflict with the statute, why it is "necessary and proper" to displace state law.

The "necessary and proper" clause is not only a sword to expand congressional legislation, but a constitutional shield for members of Congress to argue on general federalism grounds that proposed legislation is constitutionally **not** "necessary or proper."[39] The proposed required statements could serve to increase the level of constitutional discussion in Congress on pieces of legislation which are often treated as mere policy questions. Such a development might thereby help to correct the mistaken belief that constitutional debate belongs only in the courts.

Adopting the proposed rules of construction and impact statement would not only make Congress' preemption clear for every bill but also make the legal system

more efficient and predictable by providing judges and potential litigants clear rules, thereby greatly reducing preemption litigation. I recognize the ability (the power, not the right) of judges effectively to nullify any such provision if they are so inclined to exercise their will. In addition to the good faith of most judges and the advocacy of those defending the clear statement of preemption rules, however, there is the reality that judges have a strong interest in moving litigation through their courts. Therefore, many will welcome the proposals in this legislation as an unusual instance in which Congress has simplified their work.

Indeed, the clearer Congress can be in any legislation, the less it leaves to be delegated to administrative agencies. With less delegation, administrative agencies have less discretion. That is the reason for Section 6(b), which prevents agencies from preempting state law unless Congress has so specified in the legislation. As questionable at it sometimes may be as to the power of Congress to preempt, for administration agencies to do so without clear authorization of the Congress even more clearly subverts federalism.

IV. CONCLUSION

The provisions in the Federalism Accountability Act of 1999 are long overdue. They will definitely make an important contribution to stemming the erosion of federalism. It is a good beginning.

ENDNOTES

1. 514 U.S. 549 (1995).

2. "[The relevant legislation] contains no jurisdictional element which would ensure, through case-by-case inquiry, that the [crime] in question affects interstate commerce." *Id* at 549.

3. Alden v. Maine, 1999 WL 412617 (U.S.); College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 1999 WL 412639 (U.S.); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 1999 WL 412723 (U.S.).

4. *See* Michael Horowitz, *Impact of Federal Actions on States and Localities* (Congressional Testimony given 7/28/98; www.house.gov/reform/neg/hearings/testimony/horowitz.pdf).

5. THE FEDERALIST PAPERS at 322 (C. Rossiter, ed. 1961) [hereinafter THE FEDERALIST PAPERS].

6. *Id* at 246.

7. *Id* at 323.

8. 14 U.S. 304 (1816).

9. 22 U.S. 1 (1824).

10. 17 U.S. 316 (1819).

11. THE FEDERALIST PAPERS at 197-201.

12. 312 U.S. 52 (1941).

13. 430 U.S. 519 (1977).

14. 350 U.S. 497 (1956).

15. *See, e.g.*, Landgraf v. USI Film Products, 511 U.S. 244 (1994).

16. "In the final analysis, there can be no one crystal clear distinctly marked formula," Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

17. THE FEDERALIST PAPERS AT 198-99. The quote continues:

> These three cases of exclusive jurisdiction in the federal government may be exemplified by the following instances: The last clause but one in the eighth section of the first article provides expressly that Congress shall exercise *"exclusive legislation"* over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers Congress *"to lay and collect taxes, duties, imposts, and excises"*; and the second clause of the tenth section of the same article declares that *"no State shall* without the consent of Congress *lay any imposts or duties on imports or exports,* except for the purpose of executing its inspection laws." Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned; but this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification it now only extends to the *duties on imports*. This answers to the second case. The third will be found in that clause which declares that Congress shall have power "to establish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE. THE FEDERALIST PAPERS at 198-99.

18. *Id* at 201-05. *See also* Federalist 23 at 152-57 and Federalist 31 at 193-97.

19. *See* David M. Sprick, *Ex Abundanti Cautela (Out of an Abundance of Caution): A Historical Analysis of the Tenth Amendment and the Continuing Dilemma over 'Federal' Power*, 27 Cap. U. L. Rev. 529, 534 (1999).

20. *Supra*, note 8.

21. THE FEDERALIST PAPERS at 198-99.

22. 1 Cranch (5 U.S.) 137 (1803).

23. *Supra*, note 8.

24. THE FEDERALIST PAPERS at 300-25.

25. *Id* at 320.

26. 426 U.S. 833 (1976).

27. 469 U.S. 528 (1985).

28. 505 U.S. 144 (1992).

29. 521 U.S. 98 (1997).

30. 469 U.S. 528 at 554 (1985).

31. THE FEDERALIST PAPERS at 240-46.

32. H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 897 (1999).

33. Fidelity Savings and Loan Assoc. v. de La Cuesta, 458 U.S. 141 (1982).

34. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

35. *See, however*, American Trucking Associations, Inc. v. United States Environmental Protection Agency, 1999 WL 300618 (D.C. Cir.) (1999), a rare case finding that construction of the Clean Air Act on which the Environmental Protection Agency had relied was an unconstitutional delegation of legislative power.

36. 462 U.S. 919 (1983).

37. *Supra*, note 8.

38. THE FEDERALIST PAPERS at 197-201.

39. *Cf.* John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?* 16 RUTGERS L. J. 495 (1985).

Testimony of Shelley H. Metzenbaum, Ph.D.
Submitted to the Committee on Governmental Affairs
United States Senate
Regarding S. 1214,
"The Federalism Accountability Act of 1999"
July 23, 1999

Thank you for this opportunity to submit a statement for your consideration regarding S.1214, "The Federalism Accountability Act of 1999." I offer you my views primarily as a practitioner who has worked at the state and local levels of government, as well as in the federal government, not as an expert in pre-emption theory or law. I am currently a non-residential Visiting Professor at the University of Maryland School of Public Affairs. At Maryland, I started and run a program, the Compliance Consortium, that brings together a dozen state environmental agencies to learn from each other and cooperatively develop smarter ways to measure and manage their environmental compliance and enforcement programs. I am also Director of the Performance Management Project at the Kennedy School of Government at Harvard University, a program that brings federal, state, local, and private sector leaders together to make performance measurement and management more useful and effective. During the first term of the Clinton Administration, I served as the Associate Administrator of EPA for Regional Operations and State and Local Relations, where I worked extensively with state and local officials. I have also served as Undersecretary of Environmental Affairs and Director of Capital Budgeting for the Commonwealth of Massachusetts, Director of the Washington office for the City of Boston, and the economic development specialist in the Washington office of the State of Arkansas. My apologies for the lengthiness of my introduction, but my experience in government has made me very aware of the distance that often lies between the intent of a law and its actual effect.

As a practitioner, I have strong concerns about both the philosophical and the implementation implications of S.1214. While I share some of your concerns about the problems this bill is intended to address, I have strong doubts that S.1214, particularly the aspects of it that mandate specific actions by federal agencies, will fix them. Indeed, I fear that S.1214 risks having the opposite effect than that intended. It is more likely to consume scarce federal agency resources that could be used for improved communication with and assistance to state and local governments by diverting them to what is likely to be a relatively meaningless exercise. I would like to suggest that there are better ways for Congress to motivate federal agencies to work more closely with state and local governments and to consider the federalism effects of proposed rules prior to promulgation.

I respect your efforts and intentions with regard to S.1214. The American experiment with federalism was unique at its inception and has proven its value throughout the last two centuries. Its basic structure should be protected and cherished. I am constantly awestruck by the brilliant way the framers of the Constitution created the federalist structure as a sustaining check on the abuse of power by government. To quote James Madison in Federalist Paper No.51,

> ... the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

From the beginning of U.S. history, debate has raged about the appropriate roles of the national and the state governments. Madison's writings strongly suggest that this dividing line was left intentionally vague. To have drawn it cleanly and permanently would have weakened the ability of one level of government to check the power of the other when the need arose. Through legislative and political debate, the United States has continued to define and refine how federalism can best work in a changing world.

I recognize that S.1214 does not preclude that debate. Indeed, as it pertains to Congress, it appears to mandate Congressional discussion of this issue. My concern is that by mandating federal

agencies to conduct a federalism assessment, you are asking them to interpret and second-guess the delineation of authority among national, state, and local governments already decided by Congress in individual laws. When you instruct federal agencies to analyze how much a rule "regulates in an area of traditional state authority" and "the extent to which State or local authority will be maintained if the rule takes effect," you are telling the agency to re-consider an issue Congress has already decided. Agencies should be expected to do their best to interpret Congressional intent, not re-consider policy issues.

Related to this, it is unclear how you expect federal agency officials to make a judgment about issues such as "traditional State authority." What does that mean? Does it harken back to pre-Civil War tradition or only to traditions begun after that time? States have not always provided public education. Should the U.S. Department of Education therefore conclude that the provision of education is not an area of traditional state authority? Legal scholars, judges, politicians, and political scientists have long disagreed about what areas constitute "traditional State authority." How and why do we want to require federal agency officials to engage in this debate after Congress has already adopted laws defining the scope of federal agency responsibility?

I have another concern. That is, if this bill becomes law and agencies conduct and publish federalism assessments fully in accordance with the law, the law is unlikely to motivate greater communication or improved relationships among federal, state, and local officials. I doubt, also, that it will enhance the quality of public services all three levels of government, separately and collectively, deliver to the American people. S.1214 will assure that some level of analysis and reporting gets done, but will be unable to assure that it occurs at anything more than a perfunctory level. If Congress wishes to fix problems that arise because federal agencies have not sufficiently considered the roles and concerns of states and localities, there are far more effective ways to do that than through command-and-control mandates on the agencies. Allow me to suggest a few alternative mechanisms likely to be more effective in promoting the objective of getting federal agencies to pay more attention to state and local issues, and helping state and local governments understand and, if necessary, react in a timely manner to federal deliberations and decisions.

- **Fund the preparation and distribution of a weekly or monthly publication about federal actions affecting state and local governments** that is distributed free of charge to every state and local government. When federal agencies announce a notice of proposed rule-making or propose or promulgate rules that affect state or local government, they generally assume that the states and localities will learn about the proposed or new rules through their trade press or the Federal Register. Few states and localities can afford the time to wade through the massive daily Federal Register, just in case there is a federal action that might affect them. Why not create a weekly or monthly bulletin/report from the federal government that gets mailed to every state and local government containing information about all the actions of the federal government relevant to them? This publication could include: notices of proposed rule-makings, proposed rules, final rules, the calendar for federal rulemaking as it affects states and locals, grant announcements, and technical assistance availability.

  Distribution of this publication would greatly reduce the information gathering costs for states and localities. If Congress really cares about communication with states and localities, it should provide additional funding for this new publication including funding to involve state and local officials in determining the content, organization, and look-and-feel of the publication.

- **Support the StateLocal Gateway to Federal Internet-based Information.** For the last several years, some wonderfully committed public servants from many of the federal agencies have been coming together under the auspices of the National Partnership for Reinventing Government to build and maintain a gateway that organizes on-line federal information likely to interest state and local governments (www.statelocal.gov). These

federal workers have done this because they know it is the right thing to do, not because anyone told them to do it. If Congress wants to build partnership and communication between the federal government and states and localities, it should support this effort. I urge you to consider: a public commendation for the site and the workers who have made it happen; dedicated funding to allow the site builders to enhance the site; and incentives for the agencies (and the sub-units of agencies) that organize and present their information in a way that facilitates access and understanding by state and locals (e.g., through a competitive grant process.)

- **Support other Internet-based tools to improve the working relationship and communication among the federal government, states, and localities.** Technology breakthroughs on the Internet are making possible intergovernmental communication strategies that were inconceivable just a few years ago. Communication is now possible with large numbers of non-proximate interested parties at a reasonable cost. One federal agency has already experimented with an Internet-based rule-making comment process. Congress could encourage other federal agencies to test more effective ways to use the information-processing power of computers and the communication capabilities of the Internet to engage state and local governments more effectively in the rule-making process. One way it could do this would be to establish a grant program for which federal agencies can compete to support experiments in improved on-line rulemaking. This promises to be a far more effective way to transform intergovernmental rule-making practices than the proposed federalism assessment requirement.

  A competitive grant programs might also be used to motivate federal agencies to build on-line help systems and peer assistance networks for states and localities.

- **Fund communication, don't just mandate it.** S.1214 instructs agencies to notify, consult with, and provide an opportunity for participation of public officials early in the process of developing a rule. If you want agencies to be able to do that effectively, Congress needs to authorize and appropirate funding to do so. Consultation costs money, whether an agency pays for the travel of state and local officials to come together for consultation, pays for travel of the agency rule-making staff to visit state and local officials, or provides funds to state and local organizations so they can organize outreach and input on a specific rule.

- **Fund "laboratory analysis" and lesson dissemination.** The words of Justice Louis Brandeis describing the states as the "laboratories of democracy" are often cited and were mentioned by several of the witnesses before this Committee. Laboratory experiments have little value, however, if they are not studied and their results shared with others. Unfortunately, federal funding for program evaluation continues to decline, and funding for technical assistance and best-practice brokering is scarce. I would urge Congress to strengthen our federalism system by funding the "scientists" to study state and local laboratory experiments and by supporting information standards that allow objective analysis to be conducted and shared. I would urge Congress to provide much greater federal financial support to study, learn from, and disseminate the lessons of democracy's labs. Few states and localities can afford to conduct such analyses themselves, nor are they likely to have the political mandate to conduct the sorts of cross-organizational analyses that yield so much helpful information for managers in both the public and private sectors. To support a vibrant federalist system, the federal government should fund far more assessment and dissemination of the lessons of state and local experience.

I recognize that most of my suggestions urge Congress to provide additional funding for federal agencies to involve and communicate with states and localities. By funding these activities rather than mandating them with no additional funding as S.1214 proposes to do, you will be sending an important signal to the federal workforce that your concern is not just to pay lip service to the concerns of states and

localities. The agencies will understand that Congress wants to see the agencies get the job done. If you mandate this action with no additional funding, agencies will get a mixed message. I urge Congress to align its money and its voice.

I also recognize that my proposals will not fix the problems Governor Carper identified in his testimony, such as the Interstate Tax Freedom Act. The primary problems he identified, however, are problems with the laws, not with regulatory interpretation of the law. When a federal agency promulgates a rule that goes beyond law, the courts will not uphold the regulation. It makes no sense to place a new responsibility on federal agencies when the problem you are trying to fix derives from the decisions of Congress.

In sum, I urge you to bolster our federalism system by encouraging federal agencies to enrich their interaction with states and localities with incentives and rewards rather than by imposing a new regulatory burden on the agencies. The latter is more likely to divert resources from outreach and communication than to improve anticipation and understanding of the impacts of federal actions on other levels of government.

Thank you for this opportunity to share my views with you.

Written Statement Regarding S. 1214, The Federalism Accountability Act of 1999
Vicki C. Jackson
Professor of Law, Georgetown University Law Center
submitted to the
Committee on Governmental Affairs
United States Senate
July 28, 1999

I welcome the opportunity to provide a statement regarding S. 1214, the Federalism Accountability Act of 1999. I have long been interested in federalism in the United States, and in how to structure legal doctrine to maintain an appropriate constitutional balance between the powers and obligations of state and local governments and of the federal government.* I will comment on the deliberation-forcing proposals of Section 5 of the bill, and on the rules of construction relating to statutory and regulatory preemption found in Section 6 of the bill.

Comments on Section 5

In the last 10 years, federal courts have manifested concern over the effects of national legislation on state and local government authority and implied that Congress should more fully consider the effects of federal legislation on the interests of state and local governments and on the overall operation of the federal system.[2] Scholars, as well, have urged more attention in the

*I have written on federalism in academic journals; for more than a decade I have served as a Member of the Advisory Board, State and Local Legal Center (an organization providing information and on occasion legal representation to the interests of state and local governments in cases before the U.S. Supreme Court); I have Chaired (and remain on the Executive Committee of) the Federal Courts Section of the American Association of Law Schools (AALS); and I was recently elected to the Executive Board of the International Association of Constitutional Law (which promotes scholarly exchange and conferences among constitutionalists from the different nations of the world). The views expressed here are my own and are not intended in any way to represent the views of Georgetown University Law Center, the State and Local Legal Center, the Federal Courts Section of AALS, the International Association of Constitutional Law, or any other organization with which I am affiliated.

[2] For example, the Judicial Conference of the United States, in its first Long Range Plan issued in 1995, called on Congress to exercise restraint in the creation of new federal crimes and civil actions, to review existing criminal statues with a view to eliminating provisions no longer necessary and to eliminate federal jurisdiction over disputes involving workplace injuries where state courts have expertise and state laws could govern. See Long Range Plan for the Federal Courts, As Approved by the Judicial Conference of the United States, 166 F.R.D. 49 (1995). In United States v. Lopez, 514 U.S.549 (1995) the Supreme Court struck down a federal law

federal legislative process to the need for federal legislation (in light of existing state authority) and the effects of proposed federal legislation on the operation of state and local government authority.[3]

Section 5 of this Bill is designed to promote more deliberation by congressional committees and the Congress as a whole on the potentially pre-emptive effect of federal legislation. On the whole I think this is a commendable goal. In identifying a national problem it is salutary to stop and think whether or not there are benefits from allowing the problem to be addressed by the separate states, or to ask what need for, or special contribution could be made by, federal legislation. Legislation that would function essentially as an internal rule, designed to encourage explicit thinking and reporting about the preemptive effects of proposed laws, is unlikely to do any harm to national interests and may prompt greater attention to the effects of federal legislation on state and local law and authority in an appropriate manner.[4]

Some of the detailed provisions of Section 5 may, however, be both broader and narrower than would be ideal. While I understand that the focus of the legislation is preemption as such, there are other forms of federal legislation -- for example, those establishing new federal crimes -- that will *affect* state and local authority even if they do not preempt it. The committee may want to consider, in light of the broad goals stated in the Purposes section (§3), expanding the requirement for addressing the effects on state or local lawmaking or law enforcement of either

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banning possession of guns near schools, noting, inter alia, that the statute contained no findings to support reliance on the Commerce Clause as a source of federal power, nor any jurisdictional nexus to interstate commerce; Justice Kennedy's concurring opinion noted the potentially adverse effect of federal criminal laws on states abilities to experiment with alternative, nonpunitive mechanisms of achieving gun reduction in schools. Id at 581-82. In City of Boerne v. Flores, 521 U.S. 507 (1997) the Court faulted congressional hearings on the Religious Freedom Restoration Act for not disclosing current instances of invidiously motivated religious discrimination that could, under the Court's decision in *Smith v. Employment Division*, properly be the subject of legislation under section 5 of the 14th amendment; the Court expressed particular concern about the breadth of the RFRA's effects on state and local government activity. And just this Term in Fla. Prepaid Postsecondary Educ. Expenses Bd. v. College Savings Bank, 119 S. Ct. 2199 (1999) the Court found the congressional record on the potential for due process violations by states' infringing private patents to be inadequate to support legislative abrogation of state sovereign immunity to suit on such claims.

[3]See, e.g. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998).

[4]It is my understanding that under the bill as currently proposed, there is no formal enforcement mechanism for the reporting requirements of Section 5, though failure to provide the statement contemplated could be raised in floor debate.

preempting or establishing concurrent federal authorities at least where backed by criminal sanction. I recognize, however, that such a proposal might be more suitable for separate legislation.

The provisions of Section 5 may also be more ambitious than is reasonable. Requiring an "explicit statement on the extent to which the bill . . preempts" may contemplate a degree of specificity that in many cases may be rather difficult to provide, and might depend on subsequent findings by executive departments or administrative agencies. A more appropriate goal might be to include a "description of the extent to which the bill . . . is intended to preempt or to permit preemption of" state law or authority.[5]

I suggest that Section 5(b)(1), requiring identification and analysis of the extent to which the legislation affects an "area of traditional State authority", is not likely to be as helpful as it could be, given the purposes of the bill. I would think that the interests of federalism would be better served by seeking a description of the extent to which state authority (whether "traditional" or not) would be affected. For example, consider the regulation of cyberspace. Is this an "area of traditional State authority"? It depends on how one defines the area -- if one characterized the area as an aspect of "consumer regulation," then a federal regulation would be within an area of traditional state authority; if, on the other hand, one were to characterize the area as involving the "regulation of new interstate communications technologies," then the area might not be considered one of traditional state authority, given the longstanding federal role, for example, of the FCC. Moreover, as the Court pointed out in Garcia v. San Antonio Metropolitan Transit Authority, 469U.S. 528 (1985), focusing on areas of "traditional" regulation as the core aspects of state sovereignty ignores and perhaps devalues the role of states as "laboratories of experimentation" in responding to emerging social or economic problems. If only one or two states have begun to regulate an emerging area, is the fact that the area is new by itself enough to think that there are no federalism interests in considering preserving a role for the states? I would not think so.

A couple of cautionary notes. The ERISA statute, which has given rise to many litigated controversies over the scope of its preemption provision, includes both an explicit statement of the scope of federal preemption and a statement describing state or local government authority that is exempted from the preemption provision. ERISA preemption nevertheless has proven quite difficult in some cases to apply, and to predict how the courts will interpret it. Thus, even explicit attention to the preemptive effects of legislation can only go so far in anticipating future problems.

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[5] Section 5(b)(2) is, I assume, intended to elicit positive descriptions of areas in which state or local government authority is *not* preempted. If so, it might be clearer to say so, instead of referring to "the extent to which state or local government authority will be maintained...," but perhaps I misunderstand. (Federal legislation does not "maintain" state or local government authority; state authority derives from the people of the states and may be preempted by valid federal law.)

Finally it is worth bearing in mind that the effect of Section 5 in the future may be to elicit broader statements of preemption than would emerge from a less focused process. There are some areas where the degree of preemption required by a statute seems to have emerged through a process of regulation and adjudication, and I am not sure that the problems that have developed for state and local governments will necessarily be diminished by requirement of explicit deliberation in the law enacting process. However, because I think requiring somewhat greater attention to the question of whether there really is a need for federal legislation is healthy, I believe Section 5 is on balance a useful advance.

Comments on Section 6

In determining preemption policy we must remember that it is a constitutional question under the Supremacy Clause with which we deal. The Supremacy Clause and the constitutional structure as a whole do not provide any strong reason to suppose that the people benefit across-the-board more from the exercise of state than of federal authority. See FEDERALIST PAPERS, Nos. 45, 46 ("The federal and State governments are in fact but different agents and trustees of the people . . . . If . . . [the] people should in future become more partial to the federal than to the State governments . . . the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due. . . . ")

For a number of reasons, I am somewhat more skeptical about the approach of Section 6 than about the approach of Section 5. First, Section 6 may raise what courts could see as separation of powers concerns, involving incursions of the legislative branch into the judicial branch. Second, the bill's definition a direct conflict is so ambiguous that, on some constructions, it would require different results in landmark constitutional cases (such as Gibbons v. Ogden), a result unlikely to be intended by Congress. Third, a general, trans-substantive preemption provision may not be particularly effective in preserving state and local government authority and may at the same time contribute to confusion in the lower courts. Fourth, the provisions of Section 6(b) relating to the preemptive force of regulations promulgated after the effective date -- but pursuant to statutes previously enacted -- is unclear and potentially disruptive. Finally, the favorable construction provision of Section 6(c) is, in my view, inconsistent with the constitutional structure and with the far more complex demands of U.S. federalism.

**Separation of Powers Concerns*: While Congress as the legislative body clearly has the power to define the statutory terms it uses and to express its intentions on what its legislation means, it is for the Courts to interpret and apply that legislation in actual cases and controversies. In U.S. v. Klein, 80 U.S. 128 (1870), the Supreme Court held unconstitutional a statute that required federal courts to treat evidence of a presidential pardon as proof of disloyalty, disqualifying a claimant in a pending case from receiving compensation for a taking of property. In cryptic words, the Court held that by this law Congress had inadvertently violated the line separating the legislative from the judicial power:

> "In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary."

Although the prospective provisions of this proposed bill do not raise constitutional problems of legislative interference with adjudication in pending cases, it might nonetheless be argued that Congress' attempt to direct the courts in how to "construe" the effects of federal legislation on state authority under the Supremacy Clause shares in the constitutional difficulty identified in the quoted portion of *Klein*. It is one thing for Congress to clearly express its own intentions, but perhaps a different matter to instruct the courts on how the courts should perform their judicial function of interpreting the laws (including laws to be enacted in the future). Alternatively, however, the rule of construction might be regarded as a constitutionally appropriate act of lawmaking, whose effects in turn will be construed by the courts, and thus constitutionally appropriate. Cf. Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992) (interpreting appropriations law provision that specifically referred to pending case as a constitutionally appropriate modification of the underlying law to be applied by the courts). Whether or not the courts would find a separation of powers problem here, it is appropriate for Members of Congress to consider whether such a broad instruction to the Judicial Branch as to the performance of its constitutional functions is appropriate, particularly when the instruction on how legislation is to be "construed" is not ancillary to any particular act of substantive lawmaking.

Unintended Consequences as Applied to Landmark Cases: Consider, in this regard, the effect of the provisions of Section 6(a)(2) that, absent an explicit statement of preemption, preemption can be found only if "there is a direct conflict between such statute and a State or local law, ordinance or regulation such that the two cannot be reconciled or consistently stand together." Recall the case of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824): Ogden was the licensee of Fulton and Livingston, who had received a monopoly from the State of New York to operate a ferry service between points in New York and New Jersey. Gibbons, whose vessels held federal licenses as "vessels [in] the coasting trade", set up a competing ferry service. The state courts granted Ogden an injunction against Gibbons' ferry operation, but the Supreme Court held that the state's law had been preempted by the federal coastal trading license. Refusing to decide whether, in the absence of the federal law the state had authority to issue such a regulation, the Court held that the laws of the state of New York had "come into collision" with the federal law and must yield to that law. The Court interpreted the federal law as authorizing the ferries to enter New York waters for purposes of coastal trading, resulting in a direct conflict. Note that the lower courts (the state courts of New York) had sought to reconcile the two laws by construing the federal law as relating merely to ownership and registration of vessels, and as not entailing an authorization to engage in coastal trading, an interpretation rejected by the Supreme Court. What would be the result in *Gibbons* under the proposed language of Section 6(a)(2) (particularly when coupled with the final portion of Section 6(c))? To put this in other terms, if the standard is one of "physical impossibility" (i.e., that a regulated entity could not physically comply with both the federal and state standard) one could argue that since it is physically

possible for the federal licensee to ply his trade without trenching on the monopoly given by New York, the state monopoly law should not be treated as in direct conflict for preemption purposes.[6]

Problems with General, Trans-Substantive Preemption Provisions: Different areas of preemption present very different mixes of reasons for federal action and consequences for state and local governments. Trying to identify a single approach for trans-substantive preemption questions ignores the diversity of interests that the Court's interpretive patterns have recognized, in labor law, in ERISA, in civil rights laws, in products liability regulation, and in liabilities relating to goods provided to the armed forces, to mention only a few areas in which quite different approaches to preemption of state laws have been applied.

While some decades ago the Court articulated and applied the concept of "field" preemption quite broadly, on my reading of the more modern cases the broader uses of field preemption have come close to vanishing.[7] In the last decade the Court has, in many areas, presumed that Congress did not intend to preempt state law, even going so far as to construe explicit preemption provisions narrowly.[8] Although the Court nominally maintains its varied

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[6] However, if the standard is, as suggested by Professor Nelson's testimony, whether the state law prohibits what the federal law permits, then perhaps *Gibbons* would be treated as direct conflicts case under the language of Section 6(a).

[7] Cf. Kenneth Starr et al, THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES' CONFERENCE, AMERICAN BAR ASSOCIATION 18 (Section on Antitrust Law, 1991) (suggesting that the Court "may be shifting its preemption jurisprudence toward a willingness to confine the search for clear legislative intent largely to statutory language, structure and history"). This report goes on to describe implied preemption doctrines, including "occupation of the field" based on pervasive regulation or the presence of a peculiarly federal interest, and "obstacle" preemption, and argues that these approaches are imperfect proxies for legislative intent. The Report concludes that the Court "should and most likely will move closer to adopting a background rule of interpretation that requires the national legislature to indicate clearly any preemptive effects of its acts," and predicts that "we will likely see even more judicial emphasis upon express congressional indications of an intent to preempt . . . no matter what implied preemption doctrine the Court formally employs." As is evident from this passage, the Report focused on interpretation by courts, and not on whether Congress should enact a general, trans-substantive preemption provision.

[8] See, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 115 S. Ct. 2671 (1995) (unanimously construing ERISA preemption clause's "relate to" language narrowly in order to afford room for state health care reform experiments and upholding New York's hospital surcharge on commercial health care insurers); DeBuono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997) (upholding state tax on gross receipts for patient services as not preempted by ERISA's preemption provision, which Court found was not intended to modify the "starting presumption" that Congress does not intend

formulations of the different kinds of preemption, some might think that it is more of a semantic difference than a substantive point to distinguish narrow field preemption from conflicts preemption based on a state law standing as an obstacle to the accomplishment of the federal goal or from "direct" conflicts preemption. If, for example, it is the intention of a federal law to establish a uniform safety standard – to promote both the goals of safety and the goals of competitive efficiency through uniform regulation – then state safety laws are preempted, whether this be called "field," "obstacle," or "direct conflict" preemption. Compare Gade v. National Solid Wastes, 505 U.S. 88, 99, 104 n. 2 (O'Connor, J., plurality) (finding implied preemption) with id at 111-12 (Kennedy, J., concurring in judgment) (finding express preemption, but rejecting plurality's finding of implied preemption as too expansive). The question, the unanimous Court recently said, "is basically one of congressional intent." Barnett Bank v. Nelson, 515 U.S. 25, 30 (1996). The more important point is that the Supreme Court in recent decades has on the whole interpreted the preemptive force of federal statutes with moderation. Some of the Court's most activist forays in preemption in recent years would apparently not be affected by the proposed bill, since they have come in areas in which, rather than interpreting a federal statute, the Court was engaged in federal common law making. See Boyle v. United Technologies Corp., 487U.S.500 (1988) (holding that state law tort rules re military contractor defenses were preempted by a uniform federal common law rule articulated by the Court).

It is possible at the margin that the rule of construction in Section 6(a) will influence courts to read federal statutes' preemptive effects more narrowly rather than more broadly. It is also possible, however, that the existence of this statute will proliferate confusion and disparity of results in the lower courts on the preemptive effects of substantive statutes. But it is also possible, perhaps likely, that the statute will ultimately have little effect on judicial construction of subsequently enacted statutes, in light of the maxim, recently referred to and relied on by the Court, that "specific provisions qualify more general ones." Robertson v. Seattle Audubon, 503 U.S. at 439, citing Simpson v. U.S., 435 U.S. 6, 15 (1978).

I urge Members of Congress to consider instead the benefits of more focused attention to the preemptive effects of substantive legislation, as would be encouraged by the provisions of Section 5.[9] I believe this may be a sounder approach because it is more likely to result in a correct tailoring of preemption to the particular needs of the subject. In some areas (safety regulation in nuclear power plants, for example, or interstate transportation of hazardous materials) broader

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to supplant state law)

[9]For a similar conclusion with respect to other types of interpretive directives, see Alan R. Moreno, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211 (1994) (noting that "there are many problems with interpretive directions," and that "[a]lthough the idea is an appealing one to reduce the uncertainty of judicial interpretation, in practice it is not very effective for avoiding unexpected or unwanted interpretations;" arguing that "focusing on substantive drafting and responding to judicial mistakes [would] better control the application of the laws, [and] would also better respect the separation of powers").

preemption may best serve the national interests; in others (such as product labeling and consumer safety) , a much more limited preemptive effect allowing more room for state and local regulation or enforcement will be appropriate.[10]

Moreover, it is in the construction of substantive statutes that I think courts are likely to focus most of their analysis. A substance-specific approach is sounder because I think it is likely that the majority of judicial decisions will turn more heavily on the provisions of specific substantive legislation than on a trans-substantive rule of construction such as is embodied here. To the extent that the Court has concerns about the degree of serious deliberation in Congress over federalism effects, finally, it is not clear that a trans-substantive provision will be regarded as reflecting the level of serious attention that the subject deserves.

Potentially disruptive effect of Section 6(b)'s provisions relating to the preemptive force of regulations: Apart from the concerns expressed above, to the extent that this Section were construed to require an explicit statement of preemption in a statute to authorize an agency to preempt state laws through administrative regulations, it could have unfortunate and unintended results for federal statutes enacted prior to the effective date of this bill, and regulatory authorities issued under such statutes but after the effective date of the bill. If the Congresses enacting the earlier statutes intended to authorize agencies to issue regulations with preemptive effects, but did not explicitly say so because under controlling authority such explicit statements were not required, then future Congresses could be faced with a messy need to fix up legislation to authorize preemption by agency rule-making. On the other hand, it may be that reading Section 6(b) together with Section 6(a) would lead to the conclusion that the question whether agency preemption is authorized by previously enacted legislation would be (for legislation enacted prior to this bill's effective date) analyzed in accordance with prior standards, so that there would be little disruptive effect.

Section 6(c) and the Constitutional Structure: Finally, let me comment on the provisions of Section 6(c), which provides that "Any ambiguities in this Act, or in any other law of the United States, shall be construed in favor of preserving the authority of the States and the

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[10]As one example of the confusion that can result from a trans-substantive approach, consider how a court would interpret a federal statute, perhaps such as the Indian Gaming Regulatory Act, in light of the definitional section of the proposed statute defining both states and tribes as "states" entitled to favorable constructions of ambiguities under the Act or any other law of the U.S. See Section 4(3) (A), (C). Under the *Cabazon* decision, California v. Cabazon band of Mission Indians, 480 U.S. 202 (1987), states were held unable to apply their anti-gambling laws to tribal reservations. IGRA, in response, provided that gambling operations on tribal reservations could be subject to state regulation provided the State and the tribe engaged in negotiations over the regulatory scheme. One of the statutory rules concerned whether the state permitted analogous gambling activities off the reservation. If a tribe and a state were to disagree on what are analogous gambling operations, how would the instruction to construe acts favorably to the authority of the state and the tribe be applied?

may be an attempt to reiterate the idea in the Tenth Amendment, as applied to statutory construction. But recall that the Tenth Amendment reserves powers not granted to the federal government nor prohibited to the states to the states OR to the people.

The interests of the people, the ultimate source of sovereignty in the U.S. constitutional system, are not always allied with the interests of preserving state authority. Many are the examples of uses of federal authority to *expand* the powers, rights, authorities and freedoms of the people – in areas ranging from minimum wage legislation and rights to collectively bargain, to civil rights to be free of race discrimination and rights of gender equality. Ambiguities in laws should be interpreted to serve the purposes of the law, as best understood by courts at the time of decision; and if those purposes are to provide for uniform regulation and preclude state regulation then ambiguities should be construed in light of that purpose; and if the purpose is to provide for federal regulation but allow more demanding schemes of state regulation, then the ambiguity should be construed in light of those dual purposes. It seems to me inconsistent with the basic premise of the federal system – that the people express their will both through the national governments' political organs and through the organs of state government – for Congress to legislate on the assumption that national authority should be construed narrowly to preserve state authority across all areas of regulation. And it seems to me unlikely that such a sweeping, across-the-board approach, will better capture the intent of enacting Congresses with respect to substantive legislation.

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